In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-586

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
Counsel for Petitioner.

Of Counsel:
HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO & GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

Constitutional and Statutory Provisions.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. .

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Louis Ostrer petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the District Court's denial of his motion to vacate conviction and sentence.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York, denying the motion to vacate conviction and sentence, is unreported and is found in Appendix A, *infra*. The opinion of the Court of Appeals is reported at 577 F. 2d 782, and is reproduced in Appendix B, *infra*.

Jurisdiction and Proceedings Below.

On January 26, 1973, Petitioner, Louis Ostrer, was convicted in the District Court for the Southern District of New York after a three-week jury trial on 17 counts involving a stock manipulation. On April 12, 1973, Petitioner was sentenced to three years' imprisonment and a $55,000 fine. On appeal, his conviction was affirmed in a judgment of the United States Court of Appeals for the Second Circuit entered March 1, 1974. *United States* v. *Dioguardi*, 492 F. 2d 70. Certiorari was denied on October 15, 1974. *United States* v. *Ostrer*, 419 U.S. 829.

Subsequently, Ostrer learned that he had been the victim of unlawful electronic surveillance, which resulted in a motion for a new trial. His motion was denied after a hearing. *United States* v. *Ostrer*, 422 F. Supp. 93 (1976). The denial was affirmed by the Court of Appeals on the basis of the District Court's opinion, and a petition for rehearing was denied on December 21, 1976. Certiorari was denied on March 28, 1977. *Ostrer* v. *United States*, 430 U.S. 946.

The proceedings leading up to the instant petition commenced with a motion to vacate conviction and sentence filed with the District Court pursuant to 28 U.S.C. § 2255 on April 14, 1977. That court, after an extensive evidentiary hearing,

denied the motion on August 12, 1977, after making detailed findings of fact and rulings of law embodied in an unpublished opinion (Appendix A to this petition). The Court of Appeals for the Second Circuit affirmed on April 18, 1978, in a majority opinion (per Mansfield, J., joined by Smith, J.) and a concurring opinion (Moore, J.). *Ostrer* v. *United States*, 577 F. 2d 782. A petition for rehearing with suggestion for rehearing *en banc* was denied on July 10, 1978. Petitioner began serving his sentence on May 3, 1978. This petition follows. This Court has jurisdiction to review the judgment below under the provisions of 28 U.S.C. § 1254.

Constitutional Provision Involved.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

"No person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . .."

Questions Presented.

I. Is a due process violation presented, requiring the grant of a new trial, where a United States District Judge has found, after an extensive hearing on a *habeas* petition, that

> (A) the Chief of the Criminal Division of the United States Attorney's Office, by means of a "ruse," "conscious avoidance," and "intentional non-compliance" with its *Brady* obligations, "intentionally eased the way for [the Government's chief and indispensable prosecution wit-

ness Michael] Hellerman to benefit from its decision to release the $80,000 in stolen funds," thereby "intentionally allow[ing] the witness to retrieve the $80,000 thus conferring a substantial benefit on him," and where this activity was carefully and intentionally hidden from the Petitioner's trial attorney and from the trial judge; and

(B) the Government also failed to disclose that it had assisted the witness in obtaining as "a reward for his cooperation" a "rather unusual benefit," namely, permission from another judge to leave the country on a trip to Switzerland after the witness obtained the aforesaid $80,000 and just before the witness was scheduled to begin serving a prison sentence and to testify at the Petitioner's trial; and

(C) the Chief of the Criminal Division, at the witness' request, made a telephone call to the witness' lawyer, the foreseeable "result or consequence" of which was "a reduction in [the witness' legal] fees" from $100,000 to $50,000, and where this activity was not disclosed to defense counsel or the court; and

(D) a $12,500 deposit made earlier by the witness into an escrow account meant for the victims of his swindles was, without disclosure, funneled back into the witness' pocket after his testimony at the defendant's trial, and an $87,500 balance due on the witness' restitution obligation was forgiven by the Government, after the trial judge, defense counsel, and the jury at the Petitioner's trial were led to believe that these funds were paid, and would continue to be paid, for the benefit of the victims?

II. Should this Court, under its supervisory jurisdiction over the operations of the Federal Judiciary, order that the

Petitioner be granted a new trial for the reasons stated in Question I, *supra*?

III. Can suppression of clear, unambiguous evidence of serious corrupt activity by a high-ranking member of the United States Attorney's Office, where that activity results in substantial pecuniary and other benefits for a critical prosecution witness, where the benefits are perceived by the witness as a reward for his "cooperation" in the prosecution of the Petitioner, where this activity is carefully and intentionally hidden from the trial judge, defense counsel, and the jury, and where it is not contested that the witness' testimony was a *sine qua non* for the conviction of the Petitioner, ever be considered harmless or merely cumulative within the meaning of *United States* v. *Agurs*, 427 U.S. 97 (1976), simply because the jury had before it other impeachment evidence of the witness' checkered past and of official (but lawful and ethical) leniency toward him?

IV. Should the standards set down in *United States* v. *Agurs*, 427 U.S. 97 (1976), for guiding a determination in a *post-trial* setting as to when a suppression of exculpatory evidence at trial should result in reversal of a conviction, be used as a guideline for prosecutors to determine in *advance of trial* whether certain admittedly exculpatory evidence, in light of the totality of the Government's anticipated case, can be withheld at no risk to the prosecution?

V. May a majority of the members on a three-judge panel of a Court of Appeals hearing Petitioner's *habeas* appeal ignore, distort, and in some instances alter outright the careful findings of a District Judge, who determined after an extensive evidentiary hearing, on the basis of overwhelming and unambiguous testamentary and documentary evidence, that a theretofore well-regarded former high official in the United States Attorney's Office had engaged in corrupt and undis-

closed practices in dealing with the key prosecution witness responsible for Petitioner's conviction?

Introductory Statement.

It is an extremely rare case in which a defendant in a criminal case is found serving a prison sentence after a District Judge has found intentional noncompliance with the Government's *Brady* obligations and a carefully orchestrated coverup of that noncompliance, where the situation involves activity by a high prosecutorial official and involves the secret and corrupt bestowal on the Government's critical witness of hundreds of thousands of dollars' worth of pecuniary benefits. It is rarer yet for a defendant to be in prison where the only evidence against him came from the mouth of that witness. This is just such a case — probably the most serious *Brady* violation to come before this Court in recent memory, perhaps ever.

This case raises important questions as to the continued vitality of the rule that the prosecutor has a constitutional and ethical duty to disclose to defense counsel and/or to the court evidence of clearly exculpatory dimension. It also raises the issue whether a prosecution obtained entirely on the basis of the testimony of a witness tainted by corrupt and secret practices on the part of a high prosecutorial official can withstand a Due Process attack in a *habeas* action.

Equally important, this case highlights serious questions as to the proper deference which an appellate court must give to the careful findings of a District Judge, who has determined after an extensive evidentiary hearing, on the basis of overwhelming and unambiguous testamentary and documentary evidence, that a theretofore well-regarded former high official in the United States Attorney's Office had engaged in corrupt

and undisclosed practices in dealing with the key prosecution witness. (Put differently, it raises the question whether the Petitioner should continue serving a prison sentence because of an appellate court's choice to rewrite the District Judge's findings, thereby protecting the reputation of a well-regarded former prosecutor.)

Finally, this case sets out in bold relief the duty of this Court to exert its supervisory powers over the administration of justice in the lower federal courts in order to discourage and remedy corrupt practices, where it becomes apparent that the Court of Appeals has not faced up to, and corrected, a serious blot on a local United States Attorney's Office, and a serious injustice to a federal criminal defendant.

In the face of a carefully orchestrated effort by a certain person or persons in the Government to coverup the violations around which this case revolves, it was by sheer fortuity that the Petitioner learned about them and was able to bring them to the District Court's attention in his *habeas* motion.

The District Court found, *inter alia*, the following facts:

1. The Petitioner's motion arose out of "a single unexpected event," namely, the publication, by the Government's chief trial witness against the Petitioner, one Michael Hellerman, of a book entitled *Wall Street Swindler*, which revealed certain facts, previously unknown to defense counsel and to the court, which, counsel realized, if true, "would have been useful to the defense in attacking Hellerman's credibility." (Appendix A, 1a-3a.[1])

2. The Petitioner's "conviction was dependent on Hellerman's testimony." (Appendix A, at 4a.)

3. "Ostrer's trial counsel specifically requested that the Government make available any material bearing adversely

[1] Appendix A contains the "Findings and Conclusions" of District Judge Charles E. Brieant, Jr., who conducted an extensive evidentiary hearing on Petitioner's *habeas* motion.

on the credibilty, character or reputation of Hellerman." (Appendix A, at 3a.)

4. The Chief of the Criminal Division of the United States Attorney's Office (hereinafter "the Chief"[2]) participated in and aided a successful effort by Hellerman to obtain for his personal use $80,000 that belonged to the estate of a bankrupt corporation and was owed to its creditors. The Chief of the Criminal Division accomplished this through a ruse. "Having found that but for the Government activity previously described, Hellerman would not have gained access to the $80,000.00, we are constrained to find that the Government thereby conferred a benefit on its cooperating witness Hellerman which should have been disclosed to the defense." (Appendix A, at 14a.)

5. "[T]he Government's failure to alert defense counsel to this matter [of the $80,000] was intentional," and failure to inform the defense was purposeful and constituted "intentional non-compliance" with the *Brady* obligation. (Appendix A, at 14a, 15a.)

6. The Government knowingly conferred yet another benefit on Hellerman when it decided "not to oppose Hellerman's plans for a trip to Europe while he was awaiting sentence." (Appendix A, at 18a). "Failing to oppose permission for Hellerman to travel was certainly a reward for his cooperation. . . . The Government should have alerted the defense to Hellerman's European trip, since it failed to oppose bail enlargement to permit the trip to go forward, a rather unusual benefit under the circumstances of this case." (Appendix A, at 18a-19a.)

---

[2] Judge Brieant throughout his long and detailed written findings and conclusions never once mentioned the name of the prosecutor involved, but rather referred to him simply as "the Chief," which nomenclature Petitioner has adopted herein.

7. "In the logical belief that once the attorney [for Hellerman] was informed of . . . [Hellerman's] status as a cooperating witness, the fee [being charged Hellerman by his attorney, namely, $100,000] would be substantially reduced, Hellerman asked the Chief to notify the attorney of this fact. The Chief did call the attorney and Hellerman's fee was subsequently reduced by $50,000.00. Hellerman thanked the Chief for his efforts." (Appendix A, at 22a.) ". . . [T]he result or consequence of the Chief's call to counsel was a reduction in fees. The Chief may have expected that this would be the result of the call." (Appendix A, at 22a.) This telephone call was not disclosed to defense counsel.

The District Judge, who presided over the evidentiary hearing but was not the trial judge in the criminal case, concluded that these and other facts found by him did not require reversal of Petitioner's conviction, because the Government had provided defense counsel at trial with other information with which to impeach Hellerman, namely, some of Hellerman's prior crimes, and hence the *Brady* material not provided becomes of diluted importance, to the point where, in the Judge's view, it would not likely have raised a reasonable doubt in the minds of the jurors. (Appendix A, at 44a.) Furthermore, ruled the District Judge, this additional suppressed evidence of Government "largesse" toward Hellerman would not "probably" have raised a reasonable doubt, since "the jury was well acquainted with the Government's lenient treatment of Hellerman." (Appendix A, at 45a.)

On appeal, the Court of Appeals panel affirmed the judgment of the District Court. Two judges on that panel, however, substantially ignored, distorted, or altered the careful and well-supported findings of the District Judge, and, in the face of vehement protests by the third panel member at this rewriting of the well-established and unambiguous facts,

the majority of the panel declared that there was neither a Due Process nor any other violation.

If left standing, the opinion of the Court of Appeals would all but extinguish the *Brady*[3] and *Agurs*[4] rules in the Second Circuit, for it would establish the proposition that the Government need not disclose exculpatory evidence to defense counsel or to the court — including evidence of its own corrupt dealings with a key prosecution witness — so long as that witness is otherwise sufficiently flawed so that any suppressed impeachment material might be seen by an appellate court as merely "cumulative."

An affirmance in this case would, as well, approve holdings by both the District Court and the Court of Appeals to the effect that (1) actions by a prosecutor which only "incidentally" (albeit substantially) benefit a cooperating witness do not constitute *Brady* material and (2) the Government may assist in providing pecuniary benefits (in this case stolen funds) to cooperating witnesses and never disclose those payments, so long as the payments are merely Government "largesse" and are not payments which a defendant has been able to prove were negotiated *directly* and *explicitly* in exchange for testimony.

If this case is allowed to stand without intervention by this Court, the incentives for improper prosecutorial actions and inactions, the prospects of a serious erosion of defendants' rights to a fair trial, and the dangers of a serious decline in public respect for the federal judiciary, are all abundantly clear.

---

[3] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[4] *United States* v. *Agurs*, 427 U.S. 97 (1976).

Statement of Facts.

Louis Ostrer was charged in a forty-count indictment with violations of certain provisions of the Federal securities laws, mail fraud, and conspiracy. The trial court ordered acquittals on twenty-three counts. The jury acquitted Ostrer on six counts and convicted him on eleven.

Some years later, after his conviction became final, a remarkable event occurred. Michael Hellerman, the Government's chief witness at Ostrer's trial, published a book entitled *Wall Street Swindler* (Doubleday & Co., Inc., 1977), an autobiography recounting the author's life, first as a master criminal, and then as a master prosecution witness. Ostrer's counsel thereupon filed a motion under 28 U.S.C. § 2255, seeking to vacate Ostrer's conviction and sentence on the ground that certain exculpatory information, revealed in the book for the first time, was known by the Government and was suppressed at the time of trial.

District Judge Brieant, to whom the case had been transferred for collateral proceedings, convened an evidentiary hearing at which Hellerman was ordered produced, and after hearing Hellerman and numerous other witnesses and examining documents over the course of four days of testimony and argument, Judge Brieant made and filed his "Findings and Conclusions," set out in Appendix A.

FINDINGS OF THE DISTRICT COURT.

1. *Natco/Merchandise Plus Bankruptcy Fraud.*

Judge Brieant found (Appendix A, at 6a-16a) that Hellerman was desperately in need of funds to pay off some loansharks who were threatening to kill him. Hellerman thereby

designed a plan for siphoning $80,000 from Natco and Merchandise Plus, two companies that were on the verge of bankruptcy as a result of an ongoing scheme engineered earlier by Hellerman to milk their funds.

However, Hellerman learned that his cohort in crime, Samuel Falgiano a/k/a Sammy Feet, also had intentions to steal this $80,000, and Hellerman thus found himself in direct competition with Feet. Hellerman thereupon went to the Chief of the Criminal Division, disclosed the ongoing bankruptcy fraud, and revealed that Sammy Feet was about to pick up the $80,000 at a casino in the Bahamas. The Chief responded by having the FBI freeze the money at the casino's bank in Miami and by retrieving the funds himself. The Chief turned the funds over to a lawyer hand-picked by Hellerman. Hellerman then used the money for personal purposes, including payment to the loan sharks.

Judge Brieant found that Hellerman "desperately needed" these funds and that he felt that, unless he had the money to pay off the loan sharks, his life would be in danger. (Appendix A, at 7a.) The District Court made the following specific findings of fact:

> "(1) the Government prevented Sammy Feet from stealing the $80,000.00 in Natco funds by freezing the proceeds of the check which Schustek and Feet had caused to be deposited in the Bahamas casino, which had deposited it in turn in Florida; (2) Hellerman and Schustek did reveal the full story of the Natco swindle, including their own participation, to the Government, thereby making the Government fully aware of the intended goal of Natco's bankruptcy, before it released the $80,000.00 . . .; (3) the Government was aware before it reached its decision to release the funds to an attorney authorized by Schustek, that Hellerman desperately needed this money to pay off loansharks who were threatening his life." (Appendix A, at 10a.)

The District Court found that the Government's extraordinary largesse did not go unnoticed by Hellerman:

> "Hellerman expressed his own belief, at the evidentiary hearing, and in [*Wall Street Swindler*,] that the Government intentionally allowed him to retrieve the $80,000.00 thus conferring a substantial benefit on him." (Appendix A, at 11a.)

The intentional nature of the Government's conduct is clear in the court's findings:

> "The Court finds, as it must based on the record before it, that it should have been readily apparent to the Government, when it did release these funds, that the money inevitably would end up in Hellerman's pocket. In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's 'attorney' demand and receive it for deposit in a corporate bank account. By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit from its decision to release the $80,000.00 in stolen funds to an attorney 'representing' Natco." (Appendix A, at 11a-12a.)

This "charade" was kept secret until Hellerman's publication of *Wall Street Swindler*. Judge Brieant found that careful

and calculated steps were taken by the Chief at the time of the Belmont trial to keep this information from Ostrer's trial counsel. (Appendix A, at 15a.) The court found "intentional non-compliance" with the *Brady* rule by the Government on the basis of the numerous steps taken or omitted by the Government that effected a cover-up. "So many oversights may not be regarded as merely a coincidence," concluded the District Court. (Appendix A, at 16a.)

Judge Brieant concluded that this information concerning the Government's vital role in getting the $80,000 of stolen Natco funds to Hellerman constituted a violation of *Brady* v. *Maryland*. (Appendix A, at 14a.)

2. *Hellerman's Trip to Switzerland.*

Ostrer learned for the first time from reading *Wall Street Swindler* that, just prior to Hellerman's testifying in the Belmont trial, he sought and obtained from another District Judge a postponement of his surrender date to begin serving his sentence and permission to travel to Switzerland.[5] The Swiss trip ended, and Hellerman began serving his sentence, just a couple of days before he testified at Ostrer's trial.

Judge Brieant found that Hellerman obtained court permission to make the trip, with no Government opposition to his motion. The Government's non-opposition to this trip was found to be a "benefit" conferred upon Hellerman. In this connection, Judge Brieant found that "[f]ailing to oppose permission for Hellerman to travel was certainly a reward for his cooperation" (Appendix A, at 18a), and that, therefore,

> "The Government should have alerted the defense to Hellerman's European trip, since it failed to oppose bail

[5]Judge Brieant sets out the facts surrounding the Swiss trip in his opinion at Appendix A, at 16a-19a.

> enlargement to permit the trip to go forward, a rather unusual benefit under the circumstances of this case." (Appendix A, at 18a-19a.)

Judge Brieant recognized that:

> "Had the defense possessed this information it would then have had the opportunity to cross-examine Hellerman with respect to the trip and to argue to the jury that when the Government failed to oppose this junket, it conferred a benefit. Indeed it could have been argued that Hellerman intended to secrete substantial sums of money in Switzerland." (Appendix A, at 18a.)

3. *Reduction in Hellerman's Legal Fee.*

Hellerman retained a law firm that set a fee for him of $100,000,[6] before the attorneys learned that Hellerman was a cooperating witness. Then the following scenario took place:

> "In the logical belief that once the attorney was informed of his status as a cooperating witness, the fee would be substantially reduced, Hellerman asked the Chief to notify the attorney of this fact. The Chief did call the attorney and Hellerman's fee was subsequently reduced by $50,000.00. Hellerman thanked the Chief for his efforts." (Appendix A, at 22a.)

[6]Judge Brieant's discussion and findings concerning the reduction of Hellerman's legal fee are set out in his opinion, Appendix A, at 21a-23a.

Judge Brieant did "recognize that the result or consequence of the Chief's call to counsel was a reduction in fees." (Appendix A, at 22a.) The court even admitted that "The Chief may have expected that this would be the result of the call." (*Id.*) However, in the court's view, since the Government "had the right" to inform Hellerman's counsel of his status as a cooperating witness, "[t]he fee reduction was incidential." (Appendix A, at 22a, 23a.) Concluded the District Court:

> "The Government cannot be said to be conferring a benefit through the disclosure of required information simply because that information happens to be beneficial. We therefore find that the Government did not violate *Brady* by failing to inform defense counsel of the Chief's contacts with Hellerman's counsel." (Appendix A, at 23a.)

4. *Hellerman's "Restitution."*

At Ostrer's trial, Hellerman told the jury that, in connection with his own conviction, he had made restitution of $12,500, and intended to make an additional $87,500 restitution, to the victims of his swindles.

Judge Brieant found that after Hellerman's testimony at Ostrer's trial, Hellerman sought and received a refund of the escrowed $12,500, in order to fund a personal business venture, and he thereafter made no further restitution. (Appendix A, at 34a.) Judge Brieant stated that "the whole idea of making restitution in the amount of $100,000.00 is on its face an illusory and foolish thing." (*Id.*) Wrote Judge Brieant:

> "We must recognize this whole matter of the restitution for what it was — high sounding words calculated to ameliorate Hellerman's sentences on three indictments." (Appendix A, at 35a.)

Judge Brieant concluded that despite Hellerman's nonpayment of an obligation he told the jury about, and the Government's failure to do anything to hold Hellerman to his obligation, and notwithstanding the court's own view that it was unlikely from the start that restitution would be made, Hellerman's trial testimony in this regard was not perjurious, and the Government's failure to disclose was not a *Brady* violation.

Thus, the $100,000 that Hellerman saved by not making restitution, combined with the $50,000 reduction in legal fees and the $80,000 Natco funds, totalled $230,000 in Government "largesse" to Hellerman that was undisclosed to the trial judge or to defense counsel at Ostrer's trial.

CONCLUSIONS OF THE DISTRICT COURT.

The District Court applied a standard that it thought was required in light of this Court's opinion in *United States* v. *Agurs*, 427 U.S. 97 (1976). The court said:

> "We conclude that in Ostrer's case no reasonable person could say that the suppressed evidence *probably would* have altered the outcome of the trial. This conclusion is based on the fact that the Ostrer jury was already abundantly aware of Hellerman's cooperation with the Government, the substantial benefits he had obtained thereby, and of his participation in fraudulent and illegal schemes without number." (Appendix A, at 42a.) (Emphasis in opinion.)

The District Court rejected Ostrer's contention that the suppressed material would not have been merely cumulative for the jury, since it attested to the Government's willingness "to pay generously for Hellerman's testimony." The court based its rejection on three perceived factors.

First, stated the court, "[t]here is no essential difference between pecuniary benefits which are given in exchange for testimony and benefits in the form of freedom from prosecution." (Appendix A, at 42a.)

Secondly, the court said, "[t]he Government's willingness to close its eyes to Hellerman's appropriation of the $80,000 has not been shown to have been a negotiated benefit in exchange for Hellerman's testimony,"[7] even though the gift of $80,000 in stolen funds to Hellerman was meant to keep the Government's witness alive and happy. (Appendix A, at 43a.)

The third reason the court rejected Ostrer's contention that the pecuniary benefits fell into a distinct class all their own is stated as follows:

> "There is reason to believe that Hellerman's embezzlement of the $80,000.00 was tolerated only because of the Government's awareness that unless Hellerman could repay his debts, his life, and therefore his testimony would be endangered. Thus, the $80,000.00 can be considered as merely one facet of the Government's broader program to guarantee Hellerman's safety rather than as an effort to put cash in his pocket." (Appendix A, at 43a.)

[7] The District Court makes this statement notwithstanding its specific finding that one of the reasons it was to the Government's benefit to help Hellerman steal the $80,000 was because, as the Chief recognized, Hellerman's life would be in danger if he could not pay the loansharks, and this kind of danger would have required the Government to pull Hellerman off the street as an informant prematurely and place him in protective custody instead. "[I]t was in the Government's interests to leave Hellerman at liberty on an undercover basis as an informant rather than placing him in a safe house. Nor did Hellerman want to go into hiding or flee." (Appendix A, at 10a.)

This is a remarkable rationalization indeed for the Government's participation with Hellerman in a larceny in a violation of *inter alia*, Federal bankruptcy laws. Besides, it directly contradicts the second stated reason for rejecting Ostrer's contentions, for it shows beyond any doubt that there was a definite connection between Hellerman's status as a witness and the $80,000 favor done for him by the Chief.

Despite the startling nature of the revelations brought out at the evidentiary hearing and found by the District Court, that court stated that this suppressed material would not have struck the jury any differently than it was struck by the revelations at trial of earlier crimes committed by Hellerman (*without* Government assistance). The court insisted that there would be no difference in the mind of a juror between a concession by the Government limiting Hellerman's guilty plea to three indictments and his exposure to "only" five years in prison (he in fact was sentenced to two years and served only three days in jail and nine months in a "safe house"), and the kinds of "concessions" revealed at the hearing. (Appendix A, at 43a-44a.)

The Court of Appeals' Opinion.

In Ostrer's case, the Court of Appeals for the Second Circuit was faced with what was undoubtedly the most serious *Brady* violation ever to come before that court, presented by the detailed findings of a conscientious and cautious District

Judge. It was shocking to counsel, as it must have been to the District Court and, one assumes, to the Court of Appeals, to learn that the Chief had knowingly and willingly released $80,000 in stolen funds under circumstances such that "it should have been readily apparent to the Government, when it did release these funds, that the money inevitably would end up in Hellerman's pocket." (Appendix A, at 11a.) "In effect," Judge Brieant sadly concluded, "the Government chose to look the other way." (*Id.*)

It was, however, equally shocking when the majority opinion of the panel proceeded to state, as the judicially found version of the facts, not Judge Brieant's careful and unambiguous findings, but rather the version given on the witness stand by the Chief and urged by the Government in its briefs in the District Court and on appeal — which version was not credited by Judge Brieant, who saw and heard the live witnesses before him and who examined in minute detail the damning documents placed in evidence.

The concurring opinion of Judge Moore (Appendix B, at 60a-63a)[8] credited Judge Brieant's fact findings, but nevertheless concluded that revelation to the jury of such a corrupt act by a high governmental official as the illicit payment of $80,000 in stolen funds to the Government's "keystone" witness,[9] and the subsequent intentional suppression of that

[8]The opinion of the Court of Appeals is found as Appendix B to this Petition.

[9]Indeed, Michael Hellerman was more than the Government's *key* witness. He was the Government's *only* incriminating witness against Ostrer. In the absence of Hellerman's testimony, all of Ostrer's admitted actions in purchasing the securities at issue were entirely consistent with Ostrer's being Hellerman's dupe, rather than his co-conspirator or accomplice. As Judge Brieant found in an earlier proceeding, "the proof against Ostrer was substantial, *if the jury found the testimony of Hellerman credible*, as it must have done in order to have returned these guilty verdicts." *United States* v. *Ostrer*, 422 F. Supp. 93, 106 (S.D. N.Y. 1976) (emphasis supplied).

fact, would not likely have affected the verdict of a jury which, even without this shocking evidence, deliberated for 2½ days before returning its verdict.

The majority of the panel, however, decided the case on the basis of facts that were contrary to Judge Brieant's finding — a technique which obviously rankled Judge Moore and moved him to write his concurring opinion.

The majority of the panel surely understood how the evidence found by Judge Brieant would likely have affected any jury with a modicum of ethical sensibilities and common sense. Yet, rather than deal with the facts found by the District Court, the majority decided the case on the basis of facts that did not exist. The majority apparently felt that it could not affirm the District Court and uphold the conviction on the basis of the facts below, at least not without doing harm to the reputation of the Chief, who was by then in private practice and active in local bar activities.

The majority's opinion states the "facts" by summarizing the discredited testimony of the Chief, rather than Judge Brieant's findings. (Appendix B, at 50a *et seq.*) The panel fails to mention that *this version was heard and rejected by the District Court*. Thus, for example, the majority notes that the Chief "warned Hellerman and Schusteck that they would be prosecuted if the money was later diverted by them to non-corporate purposes." (*Id.* at 50a.) Judge Brieant, on the other hand, found that the Chief never intended any such prosecution, for the Chief knew that Hellerman would likely get the money.[10] As for the "warning," Judge Brieant, in stark contrast to the panel's description of it, found:

[10]"By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit from its decision to release the $80,000. . . ." (Appendix A, at 11a-12a.)

> "The Chief's contemporaneous warning to Hellerman and Schustek that they would be prosecuted if they stole this money was obviously a paper tiger, since Hellerman knew full well that if the Government didn't want him to get the money, all it had to do was keep it, or release it to a Natco receiver, its creditors or the bankruptcy court. Hellerman was right. He was never prosecuted for stealing the $80,000.00." (Appendix A, at 14a.)

The panel reports that the Natco funds, "according to [the Chief's] instructions," were deposited into "a corporate account." (Appendix B, at 51a.) Judge Brieant analyzed and described this same incident as follows:

> "In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's 'attorney' demand and receive it for deposit in a corporate bank account." (Appendix A, at 11a.)

The panel makes the following observation, claiming to be describing one of Judge Brieant's findings:

> "Although Judge Brieant found that Ostrer had failed to establish that the $80,000 was 'intentionally released to Hellerman so he could pay loansharks,' he also concluded that the Government's decision had in effect made it possible for Hellerman to gain a benefit and that it should have advised counsel of these facts prior to trial." (Appendix B, at 51a.)

This is a very different picture from what emerges from the full context of Judge Brieant's findings. Indeed, Judge Brieant found that Hellerman expressed the belief that the Government knowingly and intentionally conferred an $80,000 benefit on him (Appendix A, at 11a), while the Chief "denied strenuously that these funds were intentionally released to Hellerman so he could steal them." (*Id.*) In the face of this conflicting testimony, and the Chief's evident refusal to confirm Ostrer's claim that the Chief intentionally released the money to Hellerman, Judge Brieant noted that

> "Ostrer, who must bear the burden of proof, has been unable to confirm the contention that these funds were intentionally released to Hellerman so he could pay the loansharks." (Appendix A, at 11a.)

Judge Brieant did not, however, stop here, as the Court of Appeals majority did. He went on to say the following:

> "This, however, does not conclude the matter. The Court finds, as it must based on the record before it, that it should have been readily apparent to the Government, when it did release these funds, that the money inevitably would end up in Hellerman's pocket. In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by [a] charade . . .." (*Id.*)

In other words, Judge Brieant said simply that Ostrer could not prove the Chief's intention by direct evidence — *i.e.*, out of the Chief's mouth. However, the circumstantial evidence

was overwhelming and, as a result of it, the court had to conclude that the Chief intentionally assisted Hellerman in getting the money. "By *conscious* avoidance the Government thus *intentionally* eased the way for Hellerman to benefit from its decision to release the $80,000.00 in stolen funds . . .." (Appendix A, at 11a-12a.)

In one of its more startling statements, the majority makes the entirely unsupported claim that

> "The undisclosed evidence fell far short of a Government benefit in exchange for the witness' cooperation. It remains undisputed that [the Chief] refused to turn over the $80,000 to Hellerman and that, upon deciding to turn it over to Natco, had warned him and Schustek that they would be prosecuted if they diverted the money to non-corporate purposes. At most the Government's role, in view of Schustek's disregard of this warning, became ambiguous." (Appendix B, at 56a.)

Judge Brieant's findings utterly contradict this view. For example, Judge Brieant found that the Chief knew that Hellerman needed the money "to pay off loansharks who were threatening his life" and that "it was in the Government's interests to leave Hellerman at liberty on an undercover basis as an informant rather than placing him in a safe house. Nor did Hellerman want to go into hiding or flee." (Appendix A, at 10a.) This explains, of course, why the Chief had to get the $80,000 to Hellerman — to keep him alive, happy, nearby, and willing to take the stand.

Not only does it *not* "remain undisputed that [the Chief] refused to turn over the $80,000 to Hellerman" (Appendix B, at 56a), but Judge Brieant found precisely to the contrary — that the Chief snatched the funds out of the reach of Hellerman's rival, Sammy Feet, and "eased the way for Hellerman" to obtain the funds. (Appendix A, at 11a.)

Finally, the panel refers to "the direct incriminating evidence against Ostrer" introduced at the trial. (Appendix B, at 58a.) Yet there was *not an iota* of such evidence; neither the District Court, nor the Government in its briefs or oral arguments, had pointed to a single piece of evidence incriminating[11] Ostrer, other than the testimony of Hellerman.[12] Judge Brieant found specifically that "[c]learly, the conviction was dependent on Hellerman's testimony." (Appendix A, at 4a.)

Reasons for Granting the Writ.

A. THE SECOND CIRCUIT'S TREATMENT OF THE CORRUPT PRACTICES FOUND BY THE DISTRICT JUDGE, AND THE INJUSTICE INFLICTED ON THE PETITIONER, ARE IN STARK CONFLICT WITH THE MORE STRINGENT STANDARDS SET AND ENFORCED BY EVERY OTHER CIRCUIT, AND IS EVEN IN DIRECT CONFLICT WITH THE SECOND CIRCUIT'S OWN TREATMENT OF PRIOR, LESS EGREGIOUS CASES, WHERE THE REPUTATION OF A HIGH PROSECUTORIAL OFFICIAL WAS NOT SO CLEARLY AT STAKE.

The opinion of the Court of Appeals panel is in stark contrast to the *Brady* and *Agurs* law developed in other circuits, and to the law as it is stringently enforced in other circuits.

---

[11] There was, of course, documentary and other evidence that Ostrer purchased Belmont Franchising stock and paid for it. This was not disputed by Ostrer. The only question at trial was whether Ostrer knew of the manipulation when he bought the shares, or whether he purchased the securities on a "hot tip" from Hellerman who, unbeknownst to Ostrer, was intent on "parking" some stock with Ostrer in order to reduce the number of free-floating shares and thereby make the subsequent manipulation more manageable. The fact that Hellerman left Ostrer holding worthless stock at the end of the scheme, even though Hellerman got his friends bailed out with hefty profits, is more consistent with Ostrer's innocence than with his guilt.

[12] Judge Moore's concurring opinion suffers from the same clear error. He refers to "all the evidence before [the jury] of Ostrer's guilt." (Appendix B,

Other circuits, for example, have been far less tolerant than the panel in the case at bar, in situations where the prosecutor stood mute and allowed a witness to give misleading testimony, even if that testimony might not be technical perjury. See, for example, *Blankenship* v. *Estelle*, 545 F. 2d 510 (5th Cir. 1977)[13]; *United States* v. *McCrane*, 527 F. 2d 906 (3d Cir. 1975), *vacated and remanded*, 427 U.S. 909 (1976), *on remand*, 547 F. 2d 204 (3d Cir. 1976)[14]; *Dupart* v. *United States*, 541 F. 2d 1148 (5th Cir. 1976); *United States* v. *Sutton*, 542 F. 2d 1239 (4th Cir. 1976).

Yet, in the case at bar, the Second Circuit would tolerate the Government's standing mute while Hellerman insisted that the written plea agreement produced for the court and jury constituted his *entire* understanding with the Government, and insisted further that the favors he received were all in the nature of reduced charges and a more modest sentence.

---

at 63a.) He fails to realize, or to mention, that all of this evidence came, uncorroborated, from the mouth of Hellerman.

[13] In *Blankenship*, the Fifth Circuit was emphatic in its holding that a prosecutor is under a duty to correct not only his witness' perjury, but also an "erroneous impression" which could mislead the jury about the existence and scope of any Government deal with the witness:

> "Although in the instant case the testimony that Brooks and Crawford were 'under indictment' may have been technically true, it left the erroneous impression of an impending trial and the absence of leniency as an inducement to testify. This court has recently made clear that we will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses." 545 F. 2d at 513.

[14] In *McCrane*, the United States Attorney's office had sent letters to various business and state agencies stating that a key Government witness had cooperated with the grand jury, thereby facilitating the witness' obtaining business. The Third Circuit held that this evidence of favored treatment should have been disclosed, because this Court's holding in *United States* v. *Agurs*, *supra*, did not dilute the earlier holding in *Giglio* v. *United States*, 405 U.S. 150 (1972), to the effect that the Government could not countenance false or misleading testimony coming from its witnesses.

Similarly, other circuits have been quick to reverse convictions where there was a failure to disclose that a witness had been given financial incentives. See, for example, *United States* v. *Librach*, 520 F. 2d 550 (8th Cir. 1975)[15]; *United States* v. *Garza*, 574 F. 2d 298 (5th Cir. 1978).[16]

Yet, in the case at bar, nearly a quarter of a million dollars in incentives — $80,000 of that being stolen funds in the Government's temporary custody — are not seen as sufficiently material to warrant disclosure and, in the absence of disclosure, reversal.

In numerous other cases, courts of appeals have reversed convictions for *Brady* violations far less egregious than in the case at bar. See, for example, *United States* v. *Butler*, 567 F. 2d 885 (9th Cir. 1978); *United States* v. *Leja*, 568 F. 2d 493 (6th Cir. 1977); *United States* v. *Sanfilippo*, 564 F. 2d 176 (5th Cir. 1977).

Equally serious is the fact that the doctrines and standards sought to be promulgated by the Second Circuit in the case at bar are in stark contrast to earlier decisions within the Second Circuit itself.

Thus, the *Ostrer* holding and analysis cannot be reconciled with the recent holding in *Annunziato* v. *Manson*, 566 F. 2d 410 (2d Cir. 1977). In *Annunziato*, the Second Circuit reversed a conviction on *Brady* grounds where it was discovered post-trial that a state's witness, who at trial had denied that

---

[15] The *Librach* decision is particularly relevant, since the Eighth Circuit there dealt with a situation similar to that in the case at bar. In *Librach*, a Government witness had received $9,947.65 in "subsistence payments" from the Government, and this was not disclosed. This amounts to far less, of course, than the approximately $230,000 in undisclosed financial benefits accorded Michael Hellerman.

[16] In *Garza*, the Fifth Circuit reversed because it was undisclosed that, in a prior case, the Government had agreed to reduce from $350,000 to $20,000 the appeal bond of a person who was now a Government witness. 574 F. 2d at 301.

any "deal" had been made for his testimony, later testified in another case that indeed such a deal had been made.

Similarly, in *United States* v. *Badalamente*, 507 F. 2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975), the Second Circuit reversed a conviction because the Government failed to disclose that a prosecution witness had written to a judge that he was under pressure from the prosecutor to testify. How can a reasoned distinction be drawn between letters evidencing prosecutorial pressure on a witness, and evidence of a transaction whereby the Government's chief witness is given $80,000 in stolen funds?

In an earlier case, the Second Circuit evinced shock at a financial incentive being given to a witness even with court approval and when disclosed to the jury. *United States* v. *Franzese*, 392 F. 2d 954, 963 (2d Cir. 1968).[17]

Similarly, in earlier cases, the Second Circuit has assiduously avoided revising the fact findings of a District Judge where the findings were amply supported by the evidence.[18] Under the Second Circuit's own precedents, Judge Brieant was fully justified in drawing the conclusions he did, including his conclusion that the Chief intended to confer financial benefits upon Hellerman.[19]

---

[17] In *Franzese*, $9,800 of the proceeds of a robbery were returned, upon court order, to a Mrs. Codero — the wife of one of the robbers, a man who became a Government witness. This peculiar maneuver "was fully before the jury" at trial. *Id.* at 963. Although the Court of Appeals "confess[ed] that the Government's attitude strikes us as rather complaisant," it saw "no basis for invoking our supervisory powers when the Government submitted the issue to the trial judge . . .." *Id.* In contrast to the disclosures made in *Franzese*, the curious disposition of the Natco monies in the case at bar was neither presented to the Trial Court for approval nor presented to the jurors at the Belmont trial.

[18] See *United States* v. *Johnson*, 327 U.S. 106 (1946).

[19] In an earlier opinion written, ironically, by one member of the panel in the case at bar, the Second Circuit stated that "a defendant's knowledge of a fact may be inferred from wilful blindness to the existence of the fact," and that defendants can be convicted who "deliberately shut their eyes to what they had ample reason to believe was the truth." *United States* v. *Brawer*, 482 F. 2d 117, 129 (2d Cir. 1973). Thus, Judge Brieant's findings cannot be faulted becaue he drew logical inferences from time to time in guaging the Chief's intentions. Judge Moore, in his concurring opinion, recognizes that Judge Brieant's findings are "clearly supported by the record." (Appendix B, at 60a.)

B. The Legal Standards Announced by the Majority of the Panel Below have Ominous Implications for the Integrity of the Criminal Justice System in the Second Circuit.

What is perhaps most disturbing about the legal standards announced by the panel's majority are their implications for the future operation of the criminal justice system in the Second Circuit. If followed by prosecutors, the effects will be corrosive in the extreme.

The majority — disagreeing with Judge Brieant's specific finding and holding to the contrary — found that (1) Ostrer's trial counsel did not make a specific request for *Brady* material and (2) even if the *Brady* request filed by co-defendant's counsel were to inure to Ostrer's benefit, even that request was not sufficiently specific.

The co-defendant did indeed make the following request:

> "any other material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and . . . any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government." (Appendix A, at 39a; Appendix B, at 55a).

Both Judge Brieant and Judge Moore considered this request sufficiently specific within the meaning of *United States* v. *Agurs*, *supra*. Indeed, in light of what trial counsel knew at the time of trial, one is hard pressed to suggest how the request could have been any more specific.[20]

Furthermore, as Judge Moore points out in his concurring opinion, there is no reason, either in policy or in conformity with *Agurs*, why the request of one defendant should not be considered the request of all. (Appendix B, at 62a, n. 1.) *United States* v. *Agurs*, 427 U.S. at 106-107.[21]

The majority goes on to strike the potentially most serious blow to the integrity of the judicial process — a blow which is bound to redound to the detriment of the Second Circuit and of litigants appearing in that circuit for many years to come. The majority holds that information concerning "the Government's role in the Natco episode . . . was not material" and hence was not even *Brady* material. (Appendix B, at 58a n. 4.) Such a holding will likely result in the failure of the Government in future cases to turn over to defense counsel all manner and kind of highly exculpatory evidence, for *very little evidence would ever have to be turned over if, in order to be classed as Brady material, it has to exceed in impeachment*

[20] If the panel's opinion is permitted to stand, then all defense counsel, in order to protect their clients' *Brady* rights, will have to file voluminous and even scandalous *Brady* motions in every criminal case. Indeed, one wonders how Ostrer's counsel would have been dealt with had he filed, without foundation (for in fact the foundation was suppressed at the time), a *Brady* motion asking to be provided, *inter alia*, with evidence of all stolen funds turned over to a Government witness with the assistance of the United States Attorney's Office, and of all bankruptcy frauds in which the Government, directly or indirectly, assisted a witness to loot a bankrupt corporation's estate! This holding is nothing short of a parody of the *Agurs* requirement that the defendant make a "specific request" for exculpatory material.

[21] Indeed, in the case at bar, counsel were led to believe that "any request by either defendant inured to the benefit of the other." (Appendix A, at 39a n. 17.)

potential and relevance the Government's role in funneling $80,000 of stolen funds to the Government's only witness by means of a "charade."

At the very least, this startling holding seriously confuses the standards for judging when evidence is exculpatory (and hence subject to being disclosed under *Brady*), with the standards for judging *in the post-conviction context*, when exculpatory evidence is of such significant materiality to the verdict that failure to turn it over to trial counsel necessitates vacating the conviction.

The result called for by the majority opinion is, logically, that if and when, for example, a trial prosecutor learns that the Chief of the Criminal Division has "facilitated" a witness' obtaining stolen funds, the prosecutor need not disclose that information prior to or at trial, if the prosecutor can predict that the jury will already be faced with a considerable amount of evidence of the witness' prior wrongdoings. Yet reasonable people must agree — one hopes — that evidence such as the Natco caper is the very strongest sort of *Brady* material and absolutely must be turned over on pain of reversal. Indeed, only in a society utterly insensitive to corruption could such information not be considered vital to, if not determinative of, a jury's decision as to whether or not to believe critical parts of the key witness' testimony and hence of the Government's case.

If allowed to stand, the opinion of the Court of Appeals would have a further corrosive effect on the administration of justice in the Second Circuit because it would create a loophole in the Government's *Brady/Agurs* obligation that would be as wide as the obligation itself. Thus, for example, the Court of Appeals held that "[t]he undisclosed evidence fell far short of a Government benefit in exchange for the witness'

[22] The Court of Appeals obviously adopted, with respect to *all* of the financial favors accorded Hellerman, the District Judge's conclusion with respect

cooperation." (Appendix B, at 56a.)[22] Under this formulation, a prosecutor would be allowed to confer any number of benefits upon a witness, and fail to disclose same, provided he or she went through a "charade" to make it appear that the benefits were being conferred as mere "largesse" and not in connection with or explicitly in exchange for the witness' testimony!

In addition, the Court of Appeals' formulation leaves open a substantial possibility of future convictions of innocent defendants. Where the Government's chief witness has already been shown to be flawed by prior criminal activities revealed to the jury, it would be merely cumulative to disclose still other wrongful acts by the witness — even substantial financial rewards obtained in conjunction with a high Government official and which would demonstrate not only the witness' character, but also his bias and motive, as well as the character, bias and motive of the Government which has vouched for the witness in front of the jury.[23] *Thus, the more susceptible of disbelief a prosecution witness is, the weaker the Government's obligation of disclosure becomes*!

What the Court of Appeals has done here is to turn the "harmless error" doctrine of *Agurs* on its head. What this Court obviously meant in *Agurs* was that a failure to disclose exculpatory evidence at trial has to be weighed in terms of its effect on the trial in order to determine, in the post-conviction setting, whether a new trial has to be granted. In making such a judgment, a court should take into account the quantity and quality of *other evidence against the defendant*. If it

to only one such favor. Judge Brieant found that while the Chief's telephone call to Hellerman's lawyer had the effect of cutting his legal fee in half, and while the Chief may have known that this would be the result, the fee reduction was nevertheless incidental, for there was no negotiated *quid pro quo* of the favor in exchange for the testimony. (Appendix A, at 22a-23a.)

[23] Throughout Ostrer's trial, counsel for the Government suggested before the jury that Hellerman, for all his past misdeeds, was now reformed and was telling the truth.

turns out that the witness concerning whom the Government failed to disclose impeachment evidence was not quite so crucial to the conviction, then the *Brady* violation might be seen as harmless. This Court did *not* say in *Agurs*, or anywhere else, however, that where the tainted witness' testimony is the *sine qua non* to the conviction, the failure of the Government to fully disclose substantial impeachment material can ever be seen as harmless.[24]

The Court of Appeals opinion also exhibits an untenable — and dangerous — failure to distinguish between financial corruption of a witness, and the performance by the Government of legitimate (and usually disclosed) favors for a witness, such as the bestowal of prosecutorial leniency.[25] The Court of Appeals concluded that the evidence of financial favors was "a mere drop in the bucket when viewed in the context of the wealth of other impeaching material used upon cross-examination of Hellerman." (Appendix B, at 56a-57a.) Yet when the court goes on to list the "other impeaching material," it is seen that none of it fits into the category of financial incentives — legal or illegal. (*Id.*, at 57a-58a.)

Aside from the issue of how the jury would likely have reacted to evidence of the Natco and other financial-incentive episodes present in this case, this Court must also be concerned

[24] The Fifth Circuit in a similar situation complimented the Government for not arguing that, simply because a jury has already once convicted the defendant on the basis of weak or flawed evidence, this means that the Government has no obligation to disclose yet other flaws in that witness' testimony or character, since such additional flaws are not likely to get a better reception by the jury than the already-disclosed flaws. *See Cannon* v. *State of Alabama*, 558 F. 2d 1211, 1216 (5th Cir. 1977).

[25] This infirmity is found as well in the District Court's opinion, which said that the evidence of suppressed financial favors to the witness is not "substantively different" from the revelations disclosed to the jury that Hellerman had a checkered past and benefitted from the Government's beneficent exercise of its prosecutorial discretion. (See Appendix A, at 42a-43a.)

in its supervisory capacity with the implications of this case for the future administration of criminal justice in the Second Circuit, as well as the interest that the Bankruptcy Court has in this matter.[26] See *McNabb* v. *United States*, 318 U.S. 332 (1943).

This Court, and all federal appellate courts, have a solemn duty to take action where there is "a corruption of the truth-seeking function of the trial process." *United States* v. *Agurs*, 427 U.S. at 104. This Court has eloquently set out its duties in this regard:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity." *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956).

It is abundantly clear in this case that the Court of Appeals has failed to redress a shocking injustice done to the Petitioner, and has equally failed to set proper standards for the future guidance of District Judges as well as prosecutors. Other agencies of Government are not likely to fill the void.[27] This Court is, indeed, the forum of last resort for Petitioner and all those who might follow in his unfortunate footsteps.

---

[26] It should be noted, after all, that the funds that the Chief released, rightfully belonged to the creditors of the bankrupt corporation that was, at that very time, under the jurisdiction of the Bankruptcy Court.

[27] Counsel for Ostrer initiated correspondence with the Professional Responsibility Office of the Department of Justice with respect to the unethical and illegal actions of the Chief in this case. The most recent — and obviously final — response from that office, appended hereto as Appendix C, demonstrates how futile are Ostrer's efforts to see justice done in this matter.

Conclusion.

For the foregoing reasons, Petitioner prays that this Court issue the writ and review the judgment of the Court of Appeals.

Respectfully submitted,

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
(617) 495-4617
Counsel for Petitioner.

Of Counsel:
HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO & GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.
(617) 723-2624

Appendix A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS OSTRER,
PETITIONER,

77 CIV. 1805-CLB

-against-

UNITED STATES OF AMERICA,
RESONDENT.

Findings and Conclusions

(Following Hearing on Petition Pursuant to
28 U.S.C. § 2255)

Brieant, J.

On April 14, 1977,[1] Louis Ostrer ("Ostrer"), filed his petition pursuant to 28 U.S.C. § 2255, to vacate his January 26, 1973 conviction following a jury trial before Chief Judge Edelstein for eleven counts of stock fraud including violations of 15 U.S.C. §§77q(a), 77x, 78j(b) and 78ff, Rule 10b-5 (17 C.F.R. 240.10b-5), promulgated thereunder by the Securities and Exchange Commission, federal mail fraud statute (18 U.S.C. §1341) and the conspiracy laws (18 U.S.C. §371) arising out of the Belmont stock swindle. As a result of this con-

[1] Ostrer's surrender had been noticed for April 15, 1977 pursuant to a mandate of the Court of Appeals issued following affirmance of a denial of a prior application for post conviction relief

viction, Ostrer had been sentenced to a term of three years imprisonment and fined $55,000.00 in April of 1973.[2]

Ostrer's instant petition alleges several grounds for relief,[3] all arising out of a single unexpected event. In late March

[2]Shortly after the verdict Ostrer sought a new trial on the ground of incompetence of one of the jurors. This motion was denied by Chief Judge Edelstein in *United States* v. *Ostrer*, 361 F. Supp. 954 (S.D.N.Y. 1973). Ostrer's conviction, as well as the denial of that new trial motion, alleging that the conviction was tainted as a result of an unlawful wiretap of Ostrer's premises by the New York District Attorney. After conducting an evidentiary hearing this Court denied petitioner's motion on June 4, 1976 in *United States* v. *Ostrer*, 422 F. Supp. 93 (S.D.N.Y. 1976), *affirmed*, 551 F.2d 303 (2d Cir.) *cert. denied*, 97 S. Ct. 1581 (1977).

Ostrer then filed a third motion for a new trial on the ground that continuous cooperation between state and federal prosecutors prior to and during his trial, must have led to the tainting of the federal prosecution, through the inevitable communication of the fruits of the illegal wiretap. Since this motion was filed after the two year statute of limitations required for new trial motions by F.R.Cr.P. 33, the Court considered the motion as a petition to set aside the conviction pursuant to 28 U.S.C. §2255. That petition was denied in a Memorandum and Order of this Court filed on April 29, 1977.

Petitioner then moved for reconsideration, based on further new evidence, and a hearing was subsequently held on May 10, 1977. The Court has now reaffirmed its denial of Ostrer's petition in a separate Memorandum and Order issued simultaneously herewith.

[3]The instant petition also alleges several defects in Ostrer's sentencing proceedings. The parties have chosen, however, not to brief these allegations at this time since it is pointless to determine the validity of the sentencing if Ostrer is to be awarded a new trial. Since we cannot know whether there will be a new trial until appellate review is complete, the claims regarding the sentencing proceedings will not be treated in this decision. On resentencing, if such is required, conceivably Ostrer could receive a shorter sentence, but on the trial record a non-custodial sentence would be inappropriate in any event.

In a separate motion filed together with the instant petition, Ostrer also moved to reopen the evidentiary hearing held to determine the competence of the juror, Geneva Rush. In addition to his earlier challenge of the juror's competence, heard by Chief Judge Edelstein, Ostrer again challenged the competence of juror Rush in his motion for a new trial filed on December 11, 1974 before this Court. At the hearing on that motion it was determined

1977, more than four years after his conviction, Ostrer learned that Michael C. Hellerman, one of the Government's major witnesses at his trial, had co-authored an autobiographical memoir entitled *Wall Street Swindler* ("WSS"), which was about to be published. After a careful reading of the manuscript, of which he obtained a pre-publication uncorrected proof, Ostrer concluded that the Government had repeatedly violated his constitutional right to a fair and just trial by intentionally suppressing material in its possession, which would have been useful to the defense in attacking Hellerman's credibility.

In his petition Ostrer alleges that the Government failed to satisfy its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to provide any and all exculpatory evidence which might prove helpful to the defense. It is undisputed that Ostrer's trial counsel specifically requested that the Government make available any material bearing adversely on the credibility, character or reputation of Hellerman. Ostrer now contends that Hellerman's book, and his testimony at the hearing, demonstrates conclusively that the Government did not reveal to the defense all of the information in its possession. Ostrer further claims that possession of this information during the trial would have enabled him to avert conviction by

that Rush was an attendant and not a patient at the hospital where she was employed. Based on that determination, petitioner withdrew his motion. Since petitioner has presented no new evidence in his current set of affidavits concerning Geneva Rush, which had not already been before the Court of Appeals in 1974, the Court declines to consider petitioner's motion to vacate sentence based on the claimed incompetence of this juror. This branch of the motion is cumulative, repetitious and untimely.

destroying Hellerman's credibility with the jury. Clearly, the conviction was dependent on Hellerman's testimony.[4]

Ostrer alleges several specific instances of the Government's failure to disclose information concerning Hellerman. All have been considered. Those worthy of discussion are discussed under the separate headings below.

As a separate ground for relief, Ostrer alleges that the Government failed to turn over to the defense material which it was required to produce under 18 U.S.C. §3500. This section, commonly called the Jencks Act, requires that the Government make available to the defense prior to cross-examination all statements of a Government witness which are within the Government's possession, commonly called "3500 material", or in New York courts, "Rosario material." By custom and practice in this Circuit, this requirement has come to include all records of discussions between the prosecution and the witness, records of debriefing sessions of the witness, and any documents or prosecutors notes which incorporate the substance of any statements of the witness as, for example, internal memoranda of the United States Attorneys Office and FBI 302s. Ostrer asserts that the Government failed to turn over existing 3500 material and also "purposely failed to generate" 3500 material in order to deprive the defense of useful material with which to cross-examine Hellerman.

Ostrer specifically charges that Hellerman's book makes clear that the then Chief of the Criminal Division of the United States Attorneys Office of the Southern District of New York ("the Chief") took extensive notes of his conversations

[4]In *United States* v. *Ostrer*, 422 F. Supp. 93, 106 (S.D.N.Y. 1976) this Court held:

> "The proof against Ostrer was substantial, if the jury found the testimony of Hellerman credible, as indeed it must have done in order to have returned these guilty verdicts."

with Hellerman; yet, no such notes were turned over to the defense. Similarly, Ostrer charges that material prepared by Assistant United States Attorney ("AUSA") John Wing was never turned over to the defense in its entirety.

The third and final ground on which Ostrer bases his claim for relief is the charge that Hellerman committed perjury at the Belmont trial, both with and without the prior knowledge of the Government. Ostrer argues that the extent of Hellerman's perjury establishes that he was an inherently incredible and unreliable witness whose testimony could not be accepted as true.

An evidentiary hearing was conducted by this Court on May 10, 11 and 31, 1977 in order to make a determination as to whether or not the Government had violated its *Brady* obligations or 18 U.S.C. §3500; and to determine whether Hellerman had committed perjury at trial with respect to the specific grounds alleged by Ostrer, thereby denying petitioner's right to a fair trial. Post-hearing briefs have been received and considered. The Court has accepted and considered the final published edition of Hellerman's book, now on sale, as evidence in chief. The Government persists in its objections to this. A short answer is that the hearsay declarant (Hellerman) was available for cross-examination. Indeed, he declined to vouch for his book, without reservation, and falsely impugned the accuracy of his co-author, an experienced writer who organized the book from transcripts of tapes dictated by Hellerman. The book does have some obvious errors and a general aura of Munchausen about it. If further discussion is necessary we note that much of it comprises admissions against penal and financial interest; it was created while Hellerman was in the federal witness protection program, and he was encouraged to write it by prosecutors, marshals and other members of officialdom who facilitated this great effort before during and after. As a final bizarre twist, Hellerman, who

has been relocated under another identity to prevent his death at the hands of mobsters, says that where he now is he could not be seen in possession of the book.

Facts

A. *Brady Violations*

Petitioner's first ground for seeking relief is, as we have noted, the Government's alleged failure to provide the defense with all of the *Brady* material in its possession concerning Hellerman.

1. The Natco Swindle

Ostrer's first and most important contention is that the Government purposely withheld information concerning its role in assisting Hellerman in embezzling $80,000.00 which Hellerman, through a fraudulent scheme had drained unlawfully from Natco, Inc. and Merchandise Plus, Inc. ("Natco").[5]

[5]Natco and Merchandise Plus were two Long Island beauty supply companies. The swindle, concededly engineered by Hellerman with the aid of Schustek, involved Hellerman's acquisition of the ownership and control of both companies, using loanshark funds. His plan was to sell present and future inventory, default on the suppliers' bills for this inventory, and siphon off or steal the cash proceeds of the sale of the inventory from the companies, in a clandestine fashion. As was intended, this scheme, or "bust out", left the companies with no inventory, unpaid suppliers' bills, and creditors whose only recourse lay in bankruptcy court. Hellerman had been indicted in this district in 1971 for his role in the Natco swindle conspiracy. See *United States* v. *Falgiano et al.*, 71 Cr. 476 and 71 Cr. 499. On October 12, 1973 the Government filed a *nolle prosequi* with respect to so much of this indictment as concerns Hellerman.

As the bankruptcy of Natco became inevitable Hellerman became exceedingly anxious to obtain the last $80,000.00 still remaining in the company's account. Hellerman wrote in WSS and in his testimony at the evidentiary hearing before me said that he desperately needed these funds in order to pay off loansharks to whom he owed large sums of money. Hellerman apparently believed that delay in repaying these loans would endanger his life. At this time he was at liberty and was an undercover "cooperating individual". He therefore devised a scheme whereby Steven Schustek, then in nominal control of the company, would draw a check for the $80,000.00 in his own name, cash it and remit the proceeds to Hellerman, who would then pay off his debts. Such a check was eventually drawn to the order of, and signed by Steven Schustek. (Transcript "Tr." at 32).

However, Hellerman's plan did not work. His co-conspirator in the Natco fraud, Sam Falgiano a/k/a Sammy Feet, suspecting Hellerman's plan, determined to seize the proceeds for himself, by depositing and cashing the check in a casino in the Bahamas.[6]

Upon learning of Feet's intention, Hellerman related the whole story of the Natco conspiracy fraud to the Chief, who then arranged for the FBI to freeze the proceeds of the check, then in a Florida bank.

Having prevented Feet from stealing the money, the Government now faced the problem of determining how to dispose of the funds which had come into its possession. By this time the Government was certainly fully aware of the con-

[6]The check which Schustek had drawn to his own order was disposited by Schustek and Sammy Feet with the Paradise Island Casino in the Bahamas. After giving the check time to clear, these two were to return to the Bahamas to obtain the proceeds of the check by a facsimile gambling scheme. When Feet returned he was informed by the casino personnel that the FBI had stepped in and seized the money. (Tr. at 42).

spiracy to commit fraud culminating in Hellerman's attempt to siphon off Natco's last $80,000.00, since the full story of the fraud had been related to the Chief by both Hellerman and Schustek. (Tr. at 262, 267).

Hellerman testified at the evidentiary hearing that during his talks with the Chief he made it known that he desperately needed these funds to pay off his debts to the loansharks, who were threatening his life. The Chief did not deny, in his testimony at the hearing, that Hellerman had spoken of his pressing need for substantial sums of money (Tr. at 254), and had, in fact, requested that the $80,000.00 in Natco funds be turned over to him. (Tr. at 263-64).

When Hellerman suggested to the Chief that the Government release the $80,000.00 in Natco funds to him, this suggestion was rejected. The Chief determined, however, that his office had no legal right to continue the hold on these funds since, according to the Chief's testimony, to do so might cause Natco to go into bankruptcy thereby giving rise to a possible cause of action by Natco's creditor's against the federal government. (Tr. at 268). Faced with this perceived problem the Government concluded that these funds should be returned to Natco corporate bank account. The Government, it seems, viewed such a means of returning the funds to Natco as something which would break the chain of causation, so that if Hellerman thereafter stole the money from Natco's account a second time, or Falgiano or Schustek did so, those concerned could make the traditional Navy officer's claim: "It didn't happen on my watch, sir."

To achieve this end, the Chief apparently let it be known to Hellerman that the funds would be released only to an attorney representing Natco, so that the attorney's participation would assure that the money would go into the corporate account, rather than Hellerman's pocket.

On January 29, 1971, three days after Natco's petition in bankruptcy was filed, Edward Kurland, Esq., presented a letter to the United States Attorneys Office (Exhibit F) in which he stated that he represented Merchandise Plus (Natco) and was authorized to make a demand for the $80,000.00 check made out to Stephen Schustek, then in the possession of the United States Attorney. This letter was accompanied by a retainer appointing Kurland, which was handwritten and signed by Stephen Schustek (Ex. F). Upon receipt of these impressive documents, the Government turned over the $80,000.00 check to Kurland, who immediately deposited it in a special account in his own name. Once the check cleared, the funds were transferred to a newly established account in the name of Merchandise Plus from which Schustek subsequently withdrew all but $23.00 (Ex. G). Schustek then turned the money over to Morris Winters, Esq. (Hellerman's personal attorney who shared an office suite with Edward Kurland), who then turned it over to Hellerman. Thus, the $80,000.00 less the fees of the two attorneys, did indeed find its way forthwith to Hellerman, who doled it out to pay off loansharks who were pressing him, and for other personal purposes.

What are we to make of this bizarre story? Three questions spring immediately to mind. Did the Government knowingly allow $80,000.00 in stolen funds to be made available to Hellerman? If the Government did, in fact, aid Hellerman in this way, was it not obligated, under the *Brady* doctrine, to so inform the defense counsel at Ostrer's trial? Finally, if the Government failed to inform defense counsel of the Natco indictment and/or the facts of the stolen $80,000.00. was this failure intentional?[7]

[7]We consider *infra*, the ultimate question, namely: If the Government did so violate its obligation under *Brady*, what effect did this have on Ostrer's trial?

Not unexpectedly, petitioner would have us draw the worst possible inference, and conclude in effect that the Government was knowingly facilitating larceny by Hellerman. We must remain mindful that: "A wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by." *Costello v. Costello*, 209 N.Y. 252 (1913).

After reviewing the testimony and the exhibits received in evidence at the evidentiary hearing, the Court finds the following facts: (1) the Government prevented Sammy Feet from stealing the $80,000.00 in Natco funds by freezing the proceeds of the check which Schustek and Feet had caused to be deposited in the Bahamas casino, which had deposited it in turn in Florida; (2) Hellerman and Schustek did reveal the full story of the Natco swindle, including their own participation, to the Government, thereby making the Government fully aware of the intended goal of Natco's bankruptcy, before it released the $80,000.00 to Kurland; (3) the Government was aware before it reached its decision to release the funds to an attorney authorized by Schustek, that Hellerman desperately needed this money to pay off loansharks who were threatening his life. Moreover, it was in the Government's interests to leave Hellerman at liberty on an undercover basis as an informant rather than placing him in a safe house. Nor did Hellerman want to go into hiding or flee.

In the face of all of this, the Government released the funds to attorney Kurland, specially retained by Steven Schustek for the sole purpose of cashing this check, without investigating either Kurland or his intentions, or those of Schustek with respect to the $80,000.00. In addition, the Government made no effort to ascertain whether Natco was actually then bankrupt (which it was as of January 26, 1971, although Merchandise Plus did not file until March 8, 1971) or whether the intended fraud was sufficiently advanced so that the seized

money could be held in the Government's possession as evidence, or to prevent its theft by Hellerman.

Hellerman expressed his own belief, at the evidentiary hearing, and in WSS, that the Government intentionally allowed him to retrieve the $80,000.00 thus conferring a substantial benefit on him. He also testified, however, that the Chief warned him that if he used these funds he and Schustek would be held liable and subjected to prosecution. The Chief, in his testimony, denied strenuously that these funds were intentionally released to Hellerman so he could steal them, citing his specific warning to Hellerman and Schustek should they resume their prior attempt to embezzle the funds. Ostrer, who must bear the burden of proof, has been unable to confirm the contention that these funds were intentionally released to Hellerman so he could pay the loansharks.

This, however, does not conclude the matter. The Court finds, as it must based on the record before it, that it should have been readily apparent to the Government, when it did release these funds, that the money inevitably would end up in Hellerman's pocket. In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's "attorney" demand and receive it for deposit in a corporate bank account.[8] By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit

[8] Indeed an attorney so receiving corporate funds in the regular course, and thereafter depositing them in a corporate account would have found it difficult to prevent Schustek, an authorized signatory on the Merchandise Plus accounts, from issuing checks for noncorporate purposes. Here, however, Hellerman and Schustek could not use the regular Natco bank accounts for reasons that are obvious, and therefore opened a new one solely to clear this check and comply with the Government's requirement that it be deposited in a corporate account before being stolen.

from its decision to release the $80,000.00 in stolen funds to an attorney "representing" Natco.

We must now consider whether the Government was obligated under *Brady* to reveal this $80,000.00 matter to defense counsel at the Ostrer trial. The *Brady* obligation requires that Government make the defense aware of all benefits and promises which it has conferred upon a cooperating witness, in order that the defense will have adequate information with which to attack that witness' credibility on cross-examination.

To begin with, the Government did not inform defense counsel at trial of Hellerman's indictment in the Natco or *Falgiano* case. This oversight is surprising since defense counsel at trial were given copies of all of Hellerman's other indictments. (Belmont Tr. at 470). In addition, most of Hellerman's other indictments were included in the Memorandum of Agreement, entered into between Hellerman and the Government on October 19, 1972, a copy of which was made available to the defense.[9] The failure to inform counsel of

[9]On October 5, 1972, the Government entered into a written agreement with Michael Hellerman in which it a) offered Hellerman a plea to one two-year count in the Belmont indictment and one two-year count in the "At Your Service" indictment (*United States* v. *Hellerman*, 72 Cr. 1246) in addition to the two-year count already accepted in the Imperial indictment (*United States* v. *Aloi, et al.*, 71 Cr. 967); b) promised to secure Hellerman's physical safety while in custody; c) promised to relocate Hellerman after his incarceration; d) agreed to drop further prosecutions of Hellerman in a specified number of cases; and e) promised to use its best efforts to dissuade state and local prosecutors from pressing their related prosecutions of Hellerman. In return for these promises Hellerman agreed to a) commit no further crimes; b) refrain from doing any business in securities; c) testify truthfully at trial if required; and d) provide the Government with information when required. If Hellerman broke any of these promises the Government would then be free to prosecute Hellerman for any of his past criminal activities.

In his letter of May 18, 1977, AUSA Richard Weinberg informed the Court that this Memorandum and other *Brady* at 3500 material had been turned over to defense counsel at Ostrer's trial. At the trial, AUSA McGuire

Hellerman's Natco indictment is certainly a failure to comply with *Brady*. However, we do note that Jay Goldberg, Esq. trial counsel for Ostrer's co-defendant, John Dioguardi, knew of the Natco indictment by way of a pre-trial interview with Hellerman. Goldberg briefly questioned Hellerman about Natco in the presence of the jury. The extent of this questioning makes it abundantly clear that he knew of Hellerman's part in the Natco swindle, but not of the release of the $80,000.00 by the U.S. Attorney's Office. Maurice Edelbaum, Esq., Ostrer's trial counsel, knew nothing of Natco except what he heard at the trial and therefore did not question Hellerman on the subject.

Defense counsel in the exercise of reasonable diligence should have known of the Natco indictment because, having been filed in 1971 in this district, it was a matter of public record. But they could not have known of the $80,000.00 benefit to Hellerman, which was not described in the indictment.

For its part, the Government denies having conferred any benefit on Hellerman with respect to this $80,000.00, and therefore disclaims responsibility for informing defense counsel of the matter. AUSA McGuire who tried the Belmont case, did not himself know of the $80,000.00. By April 26, 1971 (See Ex. G), the Chief and several other AUSAs were aware of the ultimate disposition of the $80,000.00, to the extent that they knew that Hellerman's man Schustek had taken it. Under the principal set forth in *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), that the prosecutor's office is a single

informed the Court that he had "furnished [defense] counsel with [all] the various indictments in which Hellerman has been named." (Belmont tr. at 470). The Government does not dispute that the Natco indictment was not included in the batch of indictments which McGuire provided to defense counsel. (Tr. at 34).

entity for *Brady* purposes, we conclude that if the fact of Government participation with respect to the $80,000.00 is *Brady* material, then the Government was obligated to make this information known to the defense.

Having found that but for the Government activity previously described, Hellerman would not have gained access to the $80,000.00, we are constrained to find that the Government thereby conferred a benefit on its cooperating witness Hellerman which should have been disclosed to the defense. The Chief's contemporaneous warning to Hellerman and Schustek that they would be prosecuted if they stole this money was obviously a paper tiger, since Hellerman knew full well that if the Government didn't want him to get the money, all it had to do was keep it, or release it to a Natco receiver, its creditors or the bankruptcy court. Hellerman was right. He was never prosecuted for stealing the $80,000.00.

Prior to Ostrer's trial the Government was aware that Hellerman had actually obtained the funds and had used them to pay off the loansharks, and that its treatment of the money made it possible for the witness to help himself to a benefit. This knowledge should have been communicated to defense counsel at the Belmont trial as *Brady* material.

We cannot be sure whether this oversight was intentional or negligent. People intend the natural and ordinary consequences of their acts, and we may therefore infer that the Government's failure to alert defense counsel to this matter was intentional. The Government argues that its failure to notify the defense of the $80,000.00 was an innocent oversight resulting from the belief that no benefit had been conferred on Hellerman by Government, a belief which led inevitably to a failure of communication between prosecutors.[10]

[10] Although the Government is one entity for the purpose of determining the *Brady* obligation, it may not be so for the purpose of determining intent.

The Court's finding of an intentional non-compliance results from several items, including: a) the Government's failure to include the Natco indictment in the Memorandum of Agreement; b) the Government's failure to provide the defense with a copy of the Natco indictment; c) the Government's disclosure to Judge Lasker, in a memorandum of November 2, 1972 of Hellerman's cooperation in the investigation of the Natco swindle; and, d) the absence of any mention of the Natco funds in the memorandum prepared by AUSA John Wing and made available to the defense, listing matters in which Hellerman was involved but for which he would not be pros-

AUSA McGuire certainly did not intentionally suppress the information concerning the disposition of the $80,000.00 since he, himself, was unaware of the fact. On the other hand, he probably knew of the existence of the Natco indictment.

In a memorandum to Judge Lasker, dated November 2, 1972, the Government outlined Hellerman's participation in security fraud matters then pending in the Southern District of New York, and described his cooperation with the United States Attorney's Office in several investigations. This memorandum, written only two months prior to Ostrer's trial, summarized Hellerman's cooperation in Natco as follows.

> "During the fall of 1970, Hellerman also alerted this office to a bankruptcy fraud then in progress which resulted in the indictment of Samuel Falgiano and others. Your Honor will recall the facts from having presided over this trial. At the time Hellerman came to us with this information we had absolutely no knowledge of this fraud. Hellerman was instrumental in persuading Steven Schusteck to become a government witness and kept this office closely advised of the final stages of the fraud. Because of Hellerman's information we were able to prevent Falgiano and others from cashing the $100,000 of corporate checks at the gambling casinos."

The Memorandum does not tell the Court, however, of the ultimate fate of the "$100,000" which was saved from Falgiano. The most significant point about this exhibit is that it was not made available to Ostrer, nor was the information contained therein imparted to his counsel.

ecuted. The memorandum prepared for Judge Lasker by AUSA Wing, over the signature of the Chief, was never turned over to defense counsel as either *Brady* or 3500 material, nor was the underlying fact of Hellerman's participation in the Natco swindle initially, or in the $80,000.00 caper. So many oversights may not be regarded as merely a coincidence.

2. The Swiss Trip

During the summer of 1972, just prior to Ostrer's trial, Hellerman's bail was enlarged, and he was given permission by Judge Lasker to make a trip to Europe (including Switzerland) at a time when he was awaiting sentence. The Government offered no opposition to Hellerman's request, which was sought openly from the Court and when granted, became a matter of public record.

Ostrer now alleges that while on this trip Hellerman, with the knowledge and acquiescence of the Government, deposited substantial sums of money in a secret Swiss bank account. Ostrer contends that the Government's failure to inform the defense counsel of this trip constitutes another *Brady* violation.

There is no doubt that Hellerman visited Switzerland in the late summer of 1972. He was tired and needed a rest! Also, he was considering whether he would relocate there when he took up a new identity following completion of all his testimony. Nevertheless, no credible proof is offered that Hellerman deposited a large sum of money, or any money in a secret Swiss bank account during this trip. Hellerman wrote in WSS, and testified at the evidentiary hearing that he did *not* deposit substantial sums of money in Switzerland. He recalled being stopped at the airport when departing for Europe at the instance of a personal creditor who activated the New York

Port Authority Police on the suspicion that he was carrying large sums of stolen money. The police search disclosed no large sum of money. After verifying that Hellerman had permission to leave the country, the police allowed him to depart.

The Chief, as well as AUSA McGuire, in affidavits submitted in these proceedings, deny having had any knowledge that Hellerman took substantial sums of cash out of the country with him, depositing it in a foreign bank account. The Chief also testified at the evidentiary hearing that he had no such knowledge. I accept this testimony as truthful.

The only evidence offered by Ostrer of Hellerman's having deposited $300,000.00 in a secret Swiss bank account is the affidavit of April 12, 1977 and the testimony of Martin Roth, a lawyer convicted of obstruction of justice and stock fraud.[11] Roth testified that Hellerman personally informed him that he had concealed a substantial sum of money in a secret Swiss account. Roth testified that he repeated the story to Hellerman's former attorney, Mr. Ernest Schlachter. Neither party called Schlachter as a witness.

Roth appeared vindictive towards Hellerman. Although Roth, an attorney, has not been disbarred, his credibility is weak. Besides the likelihood that Roth is lying there is the further likelihood that Hellerman, whose whole life consisted in fraternizing with the "wise guys", falsely told Roth that he had money in Switzerland, and did so as part of his general braggadocio. In any event, having observed both Hellerman and

---

[11] Martin Roth was a close associate of Hellerman, since 1968. In 1971, Hellerman offered to pay for Roth's honeymoon, but did so with the help of a stolen credit card. Roth was convicted in December 1972 of participation in the so-called "Globus" stock fraud case, another Hellerman generated venture. Convicted on his plea of guilty to a second indictment in April, 1974, he served a total of fifteen months imprisonment on both cases. Roth testified at the evidentiary hearing that he had Hellerman to thank for all his legal troubles. (Tr. at 405).

Roth testify on this point, and on the basis of all the evidence I decline to find that Hellerman deposited $300,000.00, or any money, in a secret Swiss bank account. I also find that the Government was unaware of any such action by Hellerman. Even if Hellerman did secrete money during his trip to Switzerland, Ostrer has been unable to prove that Hellerman stashed money in Europe with the knowledge and consent of the United States Attorney's Office, which is the critical question. If the Government had allowed Hellerman to stash a large sum of money in Switzerland it would have conferred a substantial benefit on Hellerman, which it would then have been compelled to disclose to the defense.

The Government is required to communicate as *Brady* material information which it knows to be true. It is not required to communicate its fears or speculations. Thus, Ostrer's reliance on the fact that the Chief had expressed the fear that Hellerman might wish to stash funds or flee during his trip to Europe (Tr. at 312) is misplaced since such speculation is not *Brady* material.

The only benefit which the Government knowingly conferred upon Hellerman here was the decision not to oppose Hellerman's plans for a trip to Europe while he was awaiting sentence. Actual permission to take the trip was given by Judge Lasker in response to Hellerman's motion.

Failing to oppose permission for Hellerman to travel was certainly a reward for his cooperation. Had the defense possessed this information it would then have had the opportunity to cross-examine Hellerman with respect to the trip and to argue to the jury that when the Government failed to oppose this junket, it conferred a benefit. Indeed it could have been argued that Hellerman intended to secrete substantial sums of money in Switzerland. The Government should have alerted the defense to Hellerman's European trip, since it

failed to oppose bail enlargement to permit the trip to go forward, a rather unusual benefit under the circumstances of this case.

However, the Swiss trip was a matter of public record. It took place through the authorization of an independent judicial officer, who might well have declined to authorize it without regard to the Government's failure to oppose. I decline to find that the Government's failure to disclose the Swiss trip to the defense was intentional. It appears to have been simply an oversight, due either to a mistaken belief that the defense was aware of the trip or to the conviction that merely failing to oppose Hellerman's request of a judicial officer for permission to travel while awaiting sentence was not a benefit which resulted in the creation of *Brady* material. Whichever it was, the Court does not find an intentional suppression of *Brady* information.

3. Hellerman's Motion to Reduce Sentence

Ostrer seems to allege that the Government had some kind of undisclosed agreement with Hellerman or his attorneys in effect during Ostrer's trial, relating to Hellerman's March 3, 1973 Rule 35 motion to reduce sentence.[12] However, no evidence was offered to support this contention. No witness testified that the Government had reached any agreement with Hellerman regarding his sentence. In fact, AUSA McGuire states in his affidavit that he was unaware of any

[12] Hellerman testified at the evidentiary hearing that he had always planned to file the typical Rule 35 motion to reduce sentence. The motion was filed in March, 1973 and was heard and granted by Judge Lasker on September 28, 1973. The Government took no position with respect to this motion. Hellerman's sentence was reduced to time served with the remaining time to consist of unsupervised probation.

Government promise or representation to Hellerman relating to the Rule 35 motion. The Chief, in his testimony, corroborates McGuire's statement, which remained uncontradicted throughout the hearing. The Government, in fact, took no position on Hellerman's motion to reduce. Since we are unable to find that any promise was made to Hellerman which was not revealed to the defense, there can be no violation of the Government's *Brady* obligation in this respect.

Ostrer's real complaint here is that AUSA McGuire made a facially absurd and unfounded statement to the trial Court but not in the presence of the jury concerning Hellerman, underlined below.

> "I can make a representation, and that is what is concerning me, the government has not made any representation, express or implied that it will or even that it might make any communication of any kind whatsoever to the parole board. Indeed, it is my understanding that this witness' [Hellerman] attorneys do not expect to reply (sic) for an early parole *nor do they expect to make an application for a reduction of sentence.*" (Belmont Tr. at 696.)

As the record shows, McGuire's representations were true, but his expectation was wrong. Although it is likely that McGuire should not have stated his expectations to the Court, this complaint by Ostrer is untimely. Every sentenced hoodlum intends to make an application to reduce pursuant to Rule 35 F.R. Cr. P. There is nothing to lose but the paper. Ostrer has known since March, 1973 that McGuire's expectation was unfounded and wrong, yet he waited four years to challenge it. This contention has no place in a *habeas* petition said to be based on the revelations in Hellerman's book. It is rejected for want of merit.

4. Hellerman's Place of Imprisonment

In his petition, Ostrer alleges that the Government made a promise or representation to Hellerman that he would be able to serve his sentence in a "safe house" as opposed to an ordinary prison and that this promise was not revealed to the defense in accordance with *Brady*. Once again, however, there is no evidence in the record to support this contention. The Memorandum of Agreement, which was made available to the defense, states that the Government "will take such precautions as are necessary to secure his [Hellerman's] physical safety," while he is in prison. This statement adequately notified the defense that the Government might seek to have Hellerman serve his time in a safe house rather than an ordinary prison. (Tr. at 373-77). Moreover, AUSA Wing testified at the evidentiary hearing that prior to January, 1973 no promises or representations were made to Hellerman as to where his sentence would be served. (Tr. at 379).[13] This testimony stands uncontradicted. In fact, Hellerman's account in WSS confirms that he was not promised that he would serve his sentence in a safe house, although he made every effort to obtain such a promise. Since there was no unrevealed promise, there is no *Brady* violation.

5. Reduction of Hellerman's Attorneys Fees

Ostrer alleges that Hellerman received a benefit from the Government by way of the Government's successful efforts to

---

[13] On June 1, 1977 AUSA Richard Weinberg furnished the Court with copies of two letters written by AUSA John Wing to Henry Petersen of the Justice Department requesting that Hellerman be allowed to serve his time in a safe house. These letters are dated February 6, 1973 and May 25, 1973, well after the completion of Ostrer's trial.

gain a reduction in his attorneys fees. Hellerman reports in WSS and his testimony, that when he first consulted his chosen attorney he was asked for a retainer of $100,000.00. In the logical belief that once the attorney was informed of his status as a cooperating witness, the fee would be substantially reduced, Hellerman asked the Chief to notify the attorney of this fact. The Chief did call the attorney and Hellerman's fee was subsequently reduced by $50,000.00. Hellerman thanked the Chief for his efforts.

The Chief agrees generally with Hellerman's account of these events. He testified that he did call the attorney and discussed Hellerman's status as a cooperating witness, a fact of which the attorney was previously ignorant.[13^] He did not discuss the fee during this conversation. Since the amount of effort required to represent a cooperating witness is obviously less, counsel did reduce the fee.

The Government maintains that it committed no impropriety in revealing Hellerman's status as a cooperating witness to his attorney at his request. We agree with the Government that it neither sought nor won a fee reduction for the benefit of Hellerman. The record amply supports this conclusion. The Chief in his testimony denied that he interceded with respect to Hellerman's legal fees.

Of course, the Court does recognize that the result or consequence of the Chief's call to counsel was a reduction in fees. The Chief may have expected that this would be the result of the call. Nonetheless, the Government had the right, perhaps even the obligation, to inform Hellerman's counsel of his true status, regardless of the potential beneficial effect of this information. Hellerman's status as a cooperating witness had to have been communicated by the prosecutor to the witness' counsel, or sought by counsel from the prosecutor at some time. The fee reduction was incidental to this requirement. The Government cannot be said to be conferring a benefit through the disclosure of required information simply because that information happens to be beneficial. We therefore find that the Government did not violate *Brady* by failing to inform defense counsel of the Chief's contacts with Hellerman's counsel.

[13^] Although Hellerman had a conference with his attorney, he did not disclose his status as a cooperating witness since he was acting in an undercover capacity at that time. His conference with the attorney was not in private and he was fearful that if he disclosed his status the information would be leaked.

6. Non-prosecution of Hellerman's family

Hellerman claims that after negotiations by his attorneys the Government agreed not to prosecute any members of his immediate family. Hellerman testified to his belief that this agreement was an important part of his deal with the Government. This covenant was not made a part of the Memorandum of Agreement nor was it communicated to the defense.

Since Thomas Edwards, Esq., who assisted counsel in representing Hellerman was responsible for negotiating the agreement with the Government, Edwards is found to be a person with intimate knowledge of the contents of the agreement between Hellerman and the Government. Edwards testified that the Government informed him that whether Hellerman cooperated with the Government or not, it had no interest in prosecuting Hellerman's relatives. (Tr. at 394-95). Edwards further testified that he was "certain . . . that this had nothing to do whatsoever with any *quid pro quo* . . . between the Government and Hellerman." (*Id.* at 398.)

The Chief, in his testimony, corroborated the fact that the nonprosecution of Hellerman's family was not part of the Government's agreement with Hellerman. The failure of the

Memorandum of Agreement to mention Hellerman's family also confirms Edwards' version of the story. Hellerman may have thought that his lawyers won a big concession when, in fact, the nonprosecution was a matter of prosecutorial discretion exercised by the Government unilaterally.

Since we do not find that the Government conferred a benefit on Hellerman in return for his cooperation, the decision not to prosecute Hellerman's family was not *Brady* material, which must be turned over to the defense. Government actions which fortuitously benefit a witness are different from benefits in exchange for testimony which must be revealed to the defense to provide material for an attack on a witness' credibility.

B. *Violation of 18 U.S.C. § 3500*[14]

Ostrer claims that Hellerman's book and testimony reveal that the Government failed to turn over §3500 material which

---

[14] 18 U.S.C. §3500 provides as follows.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the

the Government generated regarding Hellerman. Hellerman testified that the Chief and other AUSAs took extensive notes of certain of their conversations. He describes one incident in great detail. According to Hellerman the Chief had a desk drawer which contained "extensive notes" which the Chief

---

subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(3) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

had taken at a session on Natco with Hellerman in the Berkshire Hotel. When, at a later date, the Chief told Hellerman that he had no such notes, Hellerman suggested that he look in his desk drawer and in fact the notes were there. (Tr. at 74-78, WSS at 269).

The Chief's testimony before me was that he took no notes of his meetings with Hellerman, which was corroborated by a search conducted by AUSA Richard Weinberg, during and after the evidentiary hearing, which revealed no 3500 material in the Natco file which could or should have been produced at the Belmont trial. (Gov't Brief II at 30). The Chief's testimony is also corroborated by the testimony of AUSA Wing who stated that he could recall no notes made by the Chief regarding Hellerman.

In a carefully formulated statement contained in his affidavit of April 28, 1977, the Chief stated that he could not recall taking any notes of conversations with Hellerman which,

> "could be construed in any way as 'a substantially verbatim recital of an oral statement' made by Hellerman which relates to the subject matter of Hellerman's testimony as contemplated by Title 18, United States Code, Section 3500."

AUSA Harold F. McGuire states in his affidavit that he produced no 3500 material other than that submitted to defense counsel at trial. McGuire also states (in further corroboration of the Chief's testimony) that he knows of no other 3500 material relating to Hellerman's testimony at Belmont which was not made available to defense counsel.

Hellerman's testimony as to the Chief's "drawerful" of notes remains uncorroborated. There is ample evidence to the contrary on this point. We are left with no more than a speculation that certain notes exist. Mere speculation is insufficient to support Ostrer's claim that the Government failed to provide existing 3500 material.

The other possibility which must be examined is that the Chief and AUSA Wing did take notes of their interviews with Hellerman but felt that these notes did not concern matters as to which Hellerman could testify on his direct examination in Belmont or that these notes did not consist of a "substantially verbatim recital" (18 U.S.C. §3500(e) definition of 'statement') of oral statements by Hellerman. This theory is supported by Wing who testified that he turned over to AUSA McGuire prior to the Belmont trial fifteen to twenty pages of his notes from Hellerman interviews. (Tr. at 369). Wing also testified, however, that these notes did not contain material relevant to Belmont. For the most part these notes concerned other investigations and other criminals. Wing prepared his two-page *Brady* memorandum which was given to defense counsel, by extracting any reference in these notes which related to Belmont or bore on Hellerman's credibility. It is well established that only those notes containing actual statements adopted or approved by the witness need be turned over to defense counsel as 3500 material. See *Goldberg* v. *United States*, 425 U.S. 94 (1976).

During the evidentiary hearing the Court instructed the Government to make available any of the Wing notes not already turned over to the defense, which might be construed as *Brady* or 3500 material. (Tr. at 370). This order included material relating to Ostrer, the Belmont trial or the prior criminality of Hellerman. The search of these notes was carried out by AUSA Weinberg, who reported that the notes contained no further *Brady* material. (See letter of AUSA Weinberg to Harvey Silverglate, May 31, 1977). We find, therefore, that Ostrer has failed to prove that the Government

was remiss in turning over existing and relevant 3500 material to the defense at the Belmont trial.

Ostrer does not stop with the claim that existing 3500 material was suppressed. He argues, in the alternative, that the Government purposely refrained from producing 3500 material on Hellerman in order to avoid the necessity of making such material available to the defense. This contention is without merit. Ostrer is unable to cite any precedent which establishes a requirement that the Government *create* 3500 material. A prosecutor has the discretion to decide whether to take any notes of his conversations with witnesses and whether to include in those notes "substantially verbatim recitals" of the statements of that witness.

Ostrer's claims with respect to *Brady* and 3500 are essentially overlapping. The *Brady* obligation requires the Government to provide the defense with exculpatory information, including written or oral material in its possession which is useful for the impeachment of a Government witness. For example, if an AUSA interviewed Hellerman and learned that Hellerman was made a promise by another AUSA, or that Hellerman had committed a new offense, he would be required to alert the defense counsel to this information, regardless of whether or not he wrote it down in the witness' words. Section 3500 requires the production of Government records of a witness' actual statements. Here, the lack of substantial 3500 material does not relieve the Government of its obligation to make the defense aware (via *Brady*) of exculpatory or "impeaching" information. The result is the same. Either material information was withheld or it was not. The Court finds no separate violation of the Government's obligation to make existing 3500 material available to the defense.

C. *Perjury by Hellerman*

Ostrer alleges several instances of Hellerman's "perjury." During the Belmont trial Hellerman characterized Ostrer as his partner or as a co-conspirator in the Belmont stock swindle. In his book, on the other hand, Hellerman identifies Ostrer as another "pigeon" in Belmont, *i.e.*, one who is himself a victim of a swindle. The characterization at trial of Ostrer by Hellerman as a conspirator rather than as a victim is viewed by Ostrer as an intentional perjury which lies at the heart of the Government's case.

Another example of Hellerman's alleged "perjury" at the Belmont trial was his claim, in connection with his own conviction, to have made restitution of $12,500.00 and his stated intention to make restitution of the remaining $87,500.00 which he had agreed to provide. Ostrer alleges that Hellerman lied again when he testified that he did not know whether Ostrer had made or lost money on the Belmont deal, since Hellerman wrote in WSS that Ostrer in fact lost $105,000.00 in the Belmont swindle. Ostrer provides other examples of contradictions between Hellerman's trial testimony and the revelations in WSS.

But beyond the particular allegations of perjury, Ostrer's contention is that Hellerman is simply a perpetual liar and therefore an inherently unreliable witness. Ostrer argues that since the Government's Memorandum of Agreement with Hellerman, which was made available to defense counsel at trial, vouches for Hellerman's credibility, the Government's knowledge of Hellerman's continuing propensity to lie required it to impart this knowledge to the defense.

In each instance of alleged perjury we must decide whether a) there was any actual perjury by Hellerman, and b) whether the Government knew of the perjury and failed to bring it to the attention of the Court and jury. Actual perjury by a

Government witness is a sufficient ground for relief in a motion for a new trial if,

> ". . . the court should decide . . . [that] the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence. . . ." *United States* v. *Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975).

It is not clear, however, that perjury by a Government witness raises a due process attack on a conviction sufficient to gain relief pursuant to 28 U.S.C. §2255. See *Brach* v. *United States*, 542 F.2d 4, 8 (2d Cir. 1976); *United States* v. *Franzese*, 525 F.2d 27, 31 n.7 (2d Cir. 1975). See also *Davis* v. *United States*, 417 U.S. 333, 345-46 (1974). If, on the other hand, the Government knowingly used perjurious testimony, a due process claim is surely raised.

At the Belmont trial, Hellerman characterized Ostrer as a co-conspirator and a "money-man". (Belmont Tr. at 427-28). In WSS, by contrast, Hellerman refers to Ostrer as "another pigeon". It is also implicit in WSS that Hellerman pulled his relatives and friends out of the Belmont swindle when it started to go bad, but left Ostrer in, holding the bag.

Hellerman has not admitted perjury or directly contradicted his trial testimony. In conveying the impression, at the Belmont trial, that Ostrer was a conspirator there is no perjury. Hellerman never stated that Ostrer was not also used in some way by Hellerman and other co-conspirators. It is possible to be both a conspirator and a victim in situations like Belmont, and nothing in Hellerman's testimony precluded the jury from drawing this conclusion. In fact, in trial Exhibit 3545, which was made available to the defense, AUSA McGuire, in an outline of Hellerman's intended testimony notes under the

sub-heading "contact with Ostrer" "[Hellerman] sets Ostrer up to buy the stock." Thus, the defense was alerted to the possibility that Ostrer was set up by Hellerman and could have cross-examined Hellerman at length on this characterization.

Moreover, Hellerman does not ever label Ostrer as a "pigeon" or "sucker" in WSS or in his testimony at the evidentiary hearing. In WSS, while discussing Ostrer's role in Belmont, Hellerman states,

> "The technique was relatively simple. I'd put someone like Ostrer in the stock at $15 with a couple of brokerage houses. Now, when I wanted to sell Ostrer out, at say $36 a share, all I had to do was find another pigeon at one of the brokerage houses and sell him the stock Ostrer was holding." WSS at 210.

From this single quotation Ostrer concludes that Hellerman believes him to have been a "pigeon". This is not the only possible interpretation of this quotation, which appears in a chapter of the book entitled, "Anything For a Buck." Elsewhere in this chapter Hellerman writes that Ostrer "became interested in getting into a stock deal with me" (*Id.*) and that Ostrer "wanted to get in on a stock bust-out so bad he could taste it." (WSS at 209). In the full context of this chapter Hellerman is hardly describing an innocent investor who unwittingly becomes a victim of a stock fraud. Rather, he is describing someone who knowingly agreed to raise money and participate in a stock fraud. The gist of the crime was joint action to perpetrate the swindle of stock houses and members of the general investing public by purchasing and later selling. All this Ostrer did. That his group leader, Hellerman, treated him unfairly is of no relevance.

This analysis is equally applicable to Ostrer's claim that Hellerman's actions in getting his friends out of Belmont in time while leaving Ostrer in to take a loss, confirms Hellerman's use of Ostrer as a victim. Once again, Hellerman's action in leaving Ostrer in the Belmont pool does not absolve Ostrer of his role in conspiring to commit a stock fraud. In any case, Hellerman certainly did alert the Government, and in turn the defense to the notion that he was not above taking advantage of his partner. I find that Hellerman committed no perjury at the Belmont trial in characterizing Ostrer as a participant in a stock fraud. I also find that the Government was not a party to any perjury in this aspect of Hellerman's testimony.

The same reasoning must be applied to Ostrer's claim that he was unfairly described by AUSA McGuire and Hellerman as the "money man" in the scheme, since in WSS Hellerman states that he "was fully aware that Lou [Ostrer] was in hock to his eyeballs to loan sharks . . ." (WSS at 209). Even if this statement is true, it has no effect on Ostrer's role as a "money man" in the Belmont stock fraud. Ostrer was able by whatever means to provide Hellerman with $105,000.00 and an additional $60,000.00.[15] (WSS at 212). Moreover, Hellerman testified at the trial that Ostrer had been forced to borrow the $60,000.00 from Hickey DiLorenzo (Belmont Tr. 472-73, 484-86) and that Hellerman himself had advanced $52,500.00 to Ostrer. (Belmont Tr. 476-483). Thus, the jury was fully aware both of Ostrer's poor financial condition and of his ability to provide cash for a phony stock deal. Hellerman's characterization of Ostrer as a "money man" is not a materially false declaration.

[15] According to Hellerman, he and Ostrer jointly borrowed the $60,000.00 from Hickey DiLorenzo at interest of $900 per week. Ostrer raised the other $105,000.00 by borrowing from several friends, two of whom became his partners in the deal. (WSS at 212).

Finally, Ostrer's claim that Hellerman committed perjury when he testified that he did not know whether Ostrer made or lost money on the Belmont deal is without merit. At the trial, when Hellerman was asked this question he responded that he did not know but could explain this answer. Ostrer's counsel permitted no explanation. (Belmont Tr. at 795). In WSS Hellerman stated that Ostrer lost $105,000.00 in the Belmont deal. (WSS at 227). In the context of the entire book, however, it is clear that Hellerman does not know who really lost the $105,000.00 since he knows that some percentage of that money is borrowed. He therefore does not know how much money Ostrer personally lost, if any. The Court finds that Hellerman committed no perjury when he stated at the trial that he did not know whether Ostrer had lost money on the Belmont deal.

During the Belmont trial Hellerman testified that he had already made restitution to his victims in the amount of $12,500.00 and that he intended to make further restitution of $87,500.00. (Belmont Tr. 671-72, 866-67). Actually, Hellerman had deposited $12,500.00 in escrow with his attorney for the ostensible purpose of making restitution to the various victims of his life of crime.

During his testimony at the evidentiary hearing, Hellerman admitted that he had paid no further restitution in the four years since the time of the Belmont trial, although he stated that he still intended to do so. Ostrer now alleges that Hellerman's statements at trial constitute perjury since he neither made restitution of the $12,500.00, nor obviously did he intend to make a further restitution. Ostrer further contends that the Government was aware of this perjury since it knew full well that Hellerman's escrow agent had not yet paid out the $12,500.00.

Unfortunately, Ostrer's position arises from a misconception concerning a sealed document which the Court inspected *in*

camera and then referred to, in passing, during the evidentiary hearing. Long after Ostrer's trial, Hellerman's attorney sought a return of the greater part of the $12,500.00 restitution which Hellerman had paid at the time of the Belmont trial, for the purpose of allowing Hellerman to make a new start in a business venture. Judge Lasker agreed to allow Hellerman to retrieve this money. Thus, at the time that Hellerman testified at the Belmont trial he had, in fact, made restitution of $12,500.00, to the extent that he had placed the money in escrow and under the control of the Court. There is certainly no perjury in that part of his testimony.

The second half of Hellerman's restitution testimony consists of his *intention* to repay the remaining $87,500.00 of the restitution figure agreed to by him at the time of sentence. Hindsight has revealed that Hellerman did not fulfill his intention as stated at the Belmont trial. But how can this Court say that it was not his intention at that time to make good on his promise? Even if Hellerman knew that he was lying, it would certainly be impossible for the Government to have known that he had no intention of fulfilling his self-proclaimed expectation. There is no evidence here that the Government and Hellerman had reached an agreement, prior to the Belmont trial, that Hellerman would not have to make restitution in the amount of $87,500.00. There is no evidence whatsoever that the Government had failed to make some such promise known to the defense. There was no such arrangement. Hellerman testified as to his subjective intentions at that time. I do not find that Hellerman committed perjury by the testimony given at Ostrer's trial.

Of course a reading of WSS shows, and it should have been readily apparent at the time, that the whole idea of making restitution in the amount of $100,000.00 is on its face an illusory and foolish thing. To begin with, that sum is a drop in the bucket measured against what he stole. And most of his ill

gotten gains were ripped off from fellow crooks, or unidentifiable members of the general public who bought stock when Hellerman sold. If the Court or Hellerman's counsel had attempted to find the claimants, determine the amount of their claims, and effect *pro rata* distribution at two cents on the dollar, they would have faced a task more complex than administering a class action recovery under Rule 23 F.R. Civ. P. We must recognize this whole matter of the restitution for what it was — high sounding words calculated to ameliorate Hellerman's sentences on three indictments. There is no showing that the concept of restitution was initiated by the Government.

Ostrer's final allegation of perjury is that Hellerman has been shown by WSS to be a hardened and continuous liar and he is therefore simply incapable of telling the truth. This is not really an allegation of a specific perjury, rather a charge that Hellerman is a liar now, and was one at the time of the Belmont trial, and the Government knew it. This argument is being made to the wrong Court at the wrong time. Whether or not we find Hellerman now to be an honest, truthful person is not significant. This same issue was in effect tendered to the jury which convicted Ostrer, and to other juries at other times in other cases. Ostrer's trial jury clearly believed enough of Hellerman's testimony to find Ostrer guilty as charged. The increment in the knowledge of Hellerman's untruthful nature over that which was known by the Belmont jury is inconsequential. The Court declines to find that as a result of Hellerman's propensity for dishonesty he must necessarily have committed perjury at the Ostrer trial. Indeed, our reading of that trial record suggests that he was a more careful witness then, than at the *habeas* hearing before me.

In sum, the Court does not find that on the evidence submitted here Hellerman committed any specific perjury at trial. It follows that the Government did not knowingly rely on perjured testimony at Ostrer's trial.

Conclusions

We have found that the Government violated its *Brady* obligation in two instances, (1) by failing to disclose to the defense its activities resulting in the release of the $80,000.00 in Natco funds which ended up in Hellerman's pocket; and, (2) by failing to disclose its consent effected by silence with respect to the permission granted to Hellerman to travel to Switzerland. There has been no *Brady* violation with respect to Hellerman's reduction in sentence, place of imprisonment, counsel fees, or the nonprosecution of Hellerman's family.

We have also found that the Government neither violated its obligations pursuant to 18 U.S.C. §3500 nor knowingly encouraged or allowed the use of perjured testimony by Hellerman.

Finally, we have found no proof of perjury in Hellerman's trial testimony with or without the Government's knowledge.

Thus, the only question which we must still answer is whether the Government's failure to disclose the Natco affair and the Swiss trip violated Ostrer's constitutional rights, thereby denying him a fair trial.

The standard for making such a determination is set forth in *United States* v. *Agurs*, 427 U.S. 97 (1976), which we are required to apply. Petitioner has argued that the *Agurs* standard is not applicable here since it was not in existence at the time of Oster's trial. We reject that contention. The instant petition was filed in April, 1977, well after the date of the *Agurs* ruling. In seeking a new trial, Ostrer is bound by the standards existing at the time his petition is considered. The Supreme Court has informed us of the correct standard for determining the materiality of undisclosed evidence, to enable us to conclude whether a new trial is constitutionally required; therefore, all prior standards are obsolete and may be regarded as having been wrong *ab initio*. See *United States* v. *Corr*, 77 Civ. 2642, p. 12 (S.D.N.Y. June 23, 1977).

In *Agurs*, the Supreme Court enumciated a tripartite test for properly applying the rule of *Brady* v. *Maryland*, in the context of three separate fact situations. Only the first two parts of the test need be considered here.

The first such category of cases is typified by *Mooney* v. *Holohan*, 294 U.S. 103 (1935), a case in which "the undisclosed evidence demonstrated that the prosecution's case included perjurious testimony and the government knew or should have known of the perjury." (Agurs at 103.)

> "In a series of subsequent cases, the Court has consistently held that a conviction obtained by the *knowing* use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (emphasis added.)

Since we have already found that Ostrer's conviction was not obtained by the knowing use of perjured testimony (nor by perjury at all) our case is not covered by the first *Agurs* standard.[16] Nonetheless, we note that the strict standard of materiality applied in such cases requires that the conviction

---

[16] In his post-hearing brief, Ostrer now claims that Hellerman's perjury is found in his affirmative answer to the question of whether his *entire* agreement with the Government was embodied in the Memorandum of Agreement. We do not find that answer to constitute perjury. Both Hellerman's attorneys and the Government believed that this Memorandum did constitute his *agreement* with the Government. If the Government conferred other benefits upon him, either directly or indirectly, Hellerman took these benefits to be mere largesse, outside his agreement to testify for the Government. This position is not unreasonable. Perjury requires scienter.

be set aside, "if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury." *Agurs* at 103. (emphasis added). The Court goes on to explain its application of the strictest standard of materiality.

> "[T]he Court has applied a strict standard of materiality, not just because they [these cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth seeking function of the trial process." *Id.* at 104.

The second category of cases treated in *Agurs* is that typified by *Brady*, where the defense has made a pretrial request for specific evidence. In *Brady* the defense requested the extrajudicial statements of the witness Boblit, Brady's accomplice. One of Boblit's extrajudicial statements was suppressed. The Supreme Court found that the suppression of this statement deprived Brady of his rights.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. 83, 87.

Material evidence, in the *Brady* context, is defined as that evidence which might have affected the outcome of the trial. In *Brady* the suppressed evidence was found to be material to the question of punishment, since the evidence, a confession by the accomplice, indicated that Brady had not actually strangled the murder victim.

The instant case is a *Brady* type case, though there is at least one significant difference. Brady involved actual exculpatory evidence whereas we are concerned here only with evidence useful for impeachment. See *Giglio* v. *United States* 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Such evidence does, of course, include evidence of favors, inducements, of promises. *United States ex rel. Washington* v. *Vincent*, 525 F.2d 262 (2d Cir. 1975). The other difference is that here the Government did not ignore or fail to respond to defendants' *Brady* request.

Prior to Ostrer's trial both Ostrer and his codefendant Dioguardi sought specific material from the Government concerning Hellerman. Dioguardi's counsel, Jay Goldberg, Esq. specifically sought,[17]

> "any material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and . . . any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government." (Ostrer's Brief I at p. 8, Ostrer's Brief II at p. 97).

In response to this request, the Government gave the defense a packet of material which included the Memorandum of Agreement, trial notes of AUSA McGuire, the two-page Wing Memorandum listing several acts for which Hellerman would not be prosecuted, and copies of many of Hellerman's indictments. (See AUSA Weinberg's letter of May 18, 1977.) In ad-

---

[17] The trial judge ruled that any request by either defendant inured to the benefit of the other.

dition, AUSA McGuire and the Chief orally informed defense counsel of the history of Hellerman's cooperation with the Government. (See Belmont Tr. pp. 525-560). The only impeachment-type evidence which the Government failed to reveal was the Natco matter and Hellerman's trip to Switzerland.

Although we recall that in *Brady* the Supreme Court specifically stated that the good faith or bad faith of the prosecutor was irrelevant in making the determination whether a defendant is entitled to a new trial, we have found that at least with respect to Natco the Government's suppression of evidence must be presumed intentional. The principle stressed in *Brady* was the avoidance of an unfair trial to the accused, not punishment of society for the blunders or misdeeds of the prosecutor. *Brady* v. *Maryland*, 373 U.S. at 87. This principle is reiterated in *Agurs*. (*Id.* at 110, n. 17).

This Circuit had developed a pre-*Agurs* standard for determining new trial motions based on "prosecutorial culpability" *and* the materiality of the evidence. The standard was set forth in detail in *United States* v. *Morrell*, 524 F.2d 550, 553 (2d Cir. 1975).

> "If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. E.g., *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982, 93 S. Ct. 2270, 36 L. Ed. 2d 958 (1972); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a 'significant chance that this added item, developed by skilled

> counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975); *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969)."

See also *United States* v. *Hinton*, 521 F.2d 164, 166 (2d Cir. 1975). We regard that rule obliterated by *Agurs*, see page 110 of 427 U.S.

We must now determine whether this suppressed evidence is material in accordance with the standard developed in *Agurs*.[18] First, we must define the term "material". In *Agurs*, the standard of materiality is whether the suppressed evidence *probably would* have affected the outcome of the trial, that is, that it creates the reasonable doubt that did not otherwise exist. See Dissent of Marshall, J. in *Agurs*, page 115. The standard differs from the "significant chance" standard previously used in this Circuit in cases where there was no prosecutorial misconduct. The latter standard provided as follows:

---

[18] In a case involving Government suppression of evidence, the defendant is not required to satisfy the difficult test of demonstrating that the newly discovered evidence would have resulted in acquittal. This is the standard generally applied in evaluating motions for new trial under F.R. Cr. P. 33 based on newly discovered evidence.

> "On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." (citation omitted) *Agurs* at 111.

> "If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside." (*Agurs*, Dissent at 119).

Only if it can be held rationally that the suppressed evidence *probably would* have created a reasonable doubt as to defendant's guilt, may the conviction be set aside.

We conclude that in Ostrer's case no reasonable person could say that the suppressed evidence *probably would* have altered the outcome of the trial. This conclusion is based on the fact that the Ostrer jury was already abundantly aware of Hellerman's cooperation with the Government, the substantial benefits he had obtained thereby, and of his participation in fraudulent and illegal schemes without number.

Ostrer argues, on the other hand, that the suppressed information is substantively different from that revealed at trial and not merely cumulative, since it attests that the Government was willing to pay generously for Hellerman's testimony. We reject this argument because of three considerations. (1) The convicting jury at the trial was aware of the extensive benefits conferred upon Hellerman in exchange for his testimony. There is no essential difference between pecuniary benefits which are given in exchange for testimony and benefits in the form of freedom from prosecution.[19] In fact, it might be argued that the benefit of less time in prison is far more valuable than a mere cash benefit to a fellow who never

[19] It was argued by the defense in summation that the Government had provided Hellerman with substantial financial benefit by failing to prosecute him for a $250,000.00 swindle he participated in after assuring the Government that he would go straight. (Belmont Tr. at 1764-65).

had any trouble getting money. (2) The Government's willingness to close its eyes to Hellerman's appropriation of the $80,000 has not been shown to have been a negotiated benefit in exchange for Hellerman's testimony. (3) There is reason to believe that Hellerman's embezzlement of the $80,000.00 was tolerated only because of the Government's awareness that unless Hellerman could repay his debts, his life, and therefore his testimony would be endangered. Thus, the $80,000.00 can be considered as merely one facet of the Government's broader program to guarantee Hellerman's safety rather than as an effort to put cash in his pocket.

During the trial the jury heard Hellerman repeatedly acknowledge his participation in numerous criminal activities. Hellerman testified that during the preceeding five years he was involved in approximately eight to twelve criminal acts for which he was not prosecuted, and three cases in which he pleaded guilty. (Belmont Tr. 390-91, 602). Hellerman acknowledged his role in frauds involving the securities of Belmont Franchising Corporation, Globus, Automated Information, Minute Approval Credit, and At Your Service Leasing. (Belmont Tr. 690-91; 716-17). He admitted that he was involved in having someone pay bribes to New York City policemen, and he testified to his well founded belief that the United States Attorney's Office would convince the local authorities not to prosecute him. (Belmont Tr. 806-07). Hellerman acknowledged that he purchased stocks, dresses, and jewelry which he knew to have been stolen (Belmont Tr. 808), and that he paid money to others for the purpose of bribing state court judges, a state liquor authority investigator, and a union delegate. (Belmont Tr. 811). In addition, Hellerman testified that he had been involved in criminal activity in connection with Natco and Merchandise Plus (Belmont Tr. 741), that he had been barred by the SEC from activities in the securities industry since 1961 (Belmont Tr. 606),

that he told Jack Kelsey to file false papers with the SEC hiding Hellerman's interest in a brokerage firm (Belmont Tr. 612), and that he participated in a scheme to submit a fraudulent check to a Bahamian bank. (Belmont Tr. 619). He also acknowledged disobeying court orders. (Belmont Tr. at 731).

The jury also heard Hellerman testify that after he had begun to cooperate with the Government and had agreed not to engage in any additional criminal activity, he broke that promise, and continued his illegal conduct. (Belmont Tr. 822-23; 938-39; 948). Hellerman testified that after he broke his promise he engaged in swindles which earned him over $250,000.00 and for which he was not prosecuted.

Finally, the summations for both Ostrer and Dioguardi were replete with references to Hellerman's corrupt and criminal activity and the "extraordinary" agreement he entered into with the Government immunizing him from prosecution for most of his crimes.

Trial counsel emphasized clearly to the jury that the Government had "bought" the testimony of a man who, having promised the United States Attorney's Office once before that he would not commit any more crimes, then went out and continued his corrupt and sordid activities. (Belmont Tr. 1721-24; 1731-33; 1754; 1783; 1793-94).

In view of the extensive data provided to the jury, we find that the Natco information is not material, in the sense that it probably would not have affected the outcome of the trial. In words quoted from *Agurs*, p. 102, it "shed no light on Sewell's [read Hellerman's] character that was not already apparent from the uncontradicted evidence." Nor does the suppressed evidence raise a reasonable doubt. One more promise or benefit to Hellerman is no evidence of Ostrer's innocence. Therefore, the Court concludes that the suppression of the Natco $80,000.00 matter does not require us to grant Ostrer a new trial.

This Swiss trip does not warrant a new trial since, for the same reasons set forth above, there is no probability that this information would have raised a reasonable doubt. The jury was well acquired with the Government's lenient treatment of Hellerman, and one more instance of Government largesse would not have been of any significance. Oster is therefore not entitled to a new trial based on the suppression of information concernig the Swiss trip.

Bail

On April 1, 1977, the Court of Appeals found that Ostrer's appeal of this Court's order of November 3, 1976, [422 F. Supp. 108 (S.D.N.Y. 1976)], denying, for want of power only, an extension of bail pending appellate finality, was moot since the Supreme Court had just denied certiorari on Ostrer's underlying claims with respect to which this Court had continued him on bail. Thereafter, Ostrer's surrender was directed for April 15, 1977.

On April 14, 1977, however, Ostrer filed the instant petition for relief pursuant to 28 U.S.C. §2255, which sought a continuation of bail pending the determination of issues not previously litigated and unknown until Hellerman published his book. The Government has agreed with Ostrer that this Court has the power to grant or continue Ostrer's bail if it finds that the new matters which he presents in his petitions raise a substantial challenge to his conviction, which, in the opinion of the Court, requires continued bail. In a letter to the Court of Appeals of April 11, 1977, AUSA Lawrence B. Pedowitz wrote as follows:

> "It is the Government's position that, while the District Court would be ill-advised to grant Ostrer bail on his motion to reopen the evidentiary hearing, since Ostrer's

underlying claims are totally without merit, the District Court does have power to release Ostrer on bail if it sees fit."

Mr. Pedowitz was referring, in his letter, to the motion which this Court denied on April 29, 1977, which was held to be totally without merit. Nonetheless, the Government concedes, by implication, that this Court has the power to grant bail on any new motion or petition brought by Ostrer. The Court also believes that it has that power.

On April 18, 1977, by an oral order of this Court, Ostrer was continued on bail pending the determination of the instant petition. We now extend bail until the Court of Appeals shall determine Ostrer's appeal from today's orders, or otherwise direct.

Ostrer has always honored the terms and conditions of his bail. His attendance at court has been prompt and regular. Although we have denied Ostrer the substantive relief which he is seeking, we find that, again, he has raised colorable claims affecting his constitutional right to a fair trial. We cannot say that the claims raised in the instant petition are imposed solely for delay. He is entitled to seek to bring these issues before the Court of Appeals prior to his incarceration, provided he proceeds diligently to do so. See *United States* v. *Ostrer*, 422 F. Supp. 93, 107-108. This is so notwithstanding the long period of time which elapsed here since the jury verdict.

So ordered.

CHARLES L. BRIEANT,
U. S. D. J.

Dated: New York, New York
August 12, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 525—September Term, 1977.

(Argued January 16, 1978 Decided April 18, 1978.)

Docket No. 77-2103

LOUIS OSTRER,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

Before:

MOORE, SMITH and MANSFIELD,

Circuit Judges.

Appeal from an order of the Southern District of New York, Charles L. Brieant, Jr., *Judge*, denying after a hearing appellant's petition under 28 U.S.C. §2255 to vacate his conviction of conspiracy to violate federal securities laws and mail and wire fraud statutes, and of substantive violations.

Affirmed.

ALAN DERSHOWITZ, Esq., Cambridge, Mass. (Harvey A. Silverglate, Esq., Ann Lambert Greenblatt, Attorney, Kenneth Kurnos, Silverglate, Shapiro & Gertner, Boston, Mass., of counsel), *for Petitioner-Appellant.*

RICHARD WEINBERG, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Lawrence Pedowitz, Robert J. Jossen, Assistant United States Attorneys, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

On January 26, 1973, Louis Ostrer was convicted by a jury in the Southern District of New York, David N. Edelstein, *Chief Judge*, after a three-week trial on 11 counts of a 40-count indictment charging him with conspiring in violation of 18 U.S.C. §371 to violate certain provisions of the federal securities laws and regulations, 15 U.S.C. §§77q(a), 77x, 78j(b), 78ff, Rule 10b-5, 17 C.F.R. 240.-10b-5, and the federal mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, and with substantive violations of these securities and mail fraud statutes. Chief Judge Edelstein sentenced him to a term of three years imprisonment and to pay fines of $55,000. We affirmed his conviction in *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974).

After pursuing other post-conviction relief without success[1] Ostrer, who has now been free on bail for more than five years, was scheduled to commence service of his sen-

1 Shortly after his conviction, Ostrer moved for a new trial on the basis of a juror's alleged mental incompetence. Judge Edelstein denied this motion at the time of sentencing. We affirmed the denial of the motion in *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974).

On December 11, 1974, Ostrer filed another motion for a new trial, which alleged that during his trial the Government had been privy to conversations between Ostrer and his counsel. After a hearing this motion was denied, *United States* v. *Ostrer*, 422 F. Supp. 93 (S.D.N.Y. 1976), and the denial of the motion was affirmed in *United States* v. *Ostrer*, 551 F.2d 303 (2d Cir.), *cert. denied*, 430 U.S. 946 (1977).

tence on April 15, 1977. However, on April 14, 1977, he filed in the district court a petition to vacate his conviction pursuant to 28 U.S.C. §2255 on the ground that the Government had not disclosed at Ostrer's trial certain information required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and 18 U.S.C. §3500, and that additional evidence had been acquired concerning the mental instability of a person who had served on his trial jury. After an evidentiary hearing, the petition was denied. We affirm.

The evidence at Ostrer's trial showed that he and several others, including his co-defendant John Dioguardi, were involved in a scheme to raise artificially the price of the stock of the Belmont Franchising Corporation (Belmont). The cornerstone of the Government's case against Ostrer was the testimony of Michael Hellerman, a participant with Ostrer and Dioguardi in the Belmont fraud. Ostrer's defense at trial consisted primarily of an attempt to impeach Hellerman's credibility. See *United States* v. *Dioguardi*, *supra*, 492 F.2d at 73-74 (2d Cir. 1974).

The present appeal is concerned principally with evidence of two incidents known to the Government prior to Ostrer's trial, but which were not discovered by Ostrer until recently. He contends that this evidence should have been made available to him as *Brady* material before trial because it amounted to benefits given to Hellerman by the Government in return for his cooperation and testimony, which Ostrer's counsel could have exploited in his cross-examination of Hellerman to show a further motive for Hellerman to lie.

The first of these incidents is the so-called "Natco Episode." While Hellerman was cooperating secretly as a Government informant in 1970-71 he advised the United States Attorney's Office that he and several other individuals were involved in a fraud designed to drive Natco,

Inc. ("Natco"), and Merchandise Plus, Inc., two Long Island-based companies, into bankruptcy. As the companies went bankrupt, Hellerman and others, including Steven Schusteck, the president of Natco, planned to steal the companies' assets and leave the creditors empty-handed.

Hellerman informed the Government that part of this fraud involved the cashing of an $80,000 check through a casino in the Bahamas. Acting on Hellerman's information, FBI agents were able to thwart this aspect of the fraud by preventing the check from being cashed. As a result, however, the Government found itself in possession of corporate funds belonging to Natco.

Robert Morvillo, formerly chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, testified at the hearing on appellant's §2255 petition that the Government did not feel that it could maintain control over this money for fear of accelerating Natco's decline into bankruptcy and of possibly becoming entangled in litigation with Natco or its creditors. The situation was complicated by Hellerman, who was deeply in debt to several loansharks and had suggested to Morvillo that the Government give him the money to pay his debts.

Morvillo rejected this suggestion but told Hellerman that the Government would release the money to a lawyer representing Natco on the assurance that the funds would be placed in the corporation's account. Both Morvillo and Hellerman testified that Morvillo warned Hellerman and Schusteck that they would be prosecuted if the money was later diverted by them to non-corporate purposes.

On February 1, 1971, Edward Kurland, a lawyer retained by Schusteck for the sole purpose of retrieving the $80,000, presented to the U.S. Attorney's Office a written

demand on behalf of Natco for the funds, which were then released to him and deposited in a corporate account, according to Morvillo's instructions. Within a few weeks, however, the money was transferred to another account, and Schusteck then withdrew all but a few dollars of the full amount, at least a portion of which was used by Hellerman to pay his debts.

Morvillo could not recall whether he learned prior to Ostrer's trial that Hellerman had been able to pay his debts from the $80,000; and Hellerman did not recall ever so informing Morvillo. The record contains an uncontradicted affidavit, which the district court credited, from the Assistant U.S. Attorney who prosecuted Ostrer in 1973 to the effect that prior to Ostrer's trial he knew nothing of Natco or of the $80,000 transaction. However, the record also contains a memorandum dated April 26, 1971 (less than three months after Morvillo gave the Natco check to Kurland) sent to Morvillo from the Assistant U.S. Attorney directly responsible for Hellerman-related investigations in 1971, which describes Schusteck's transfer of the money from the corporate account and his withdrawal of "all but $23 of the $80,000 in cash—$100 bills." On the basis of this memorandum the district court found that the Government knew, or should have known, as early as April, 1971, that Schusteck and Hellerman had not heeded Morvillo's instructions concerning the proper disposition of the Natco funds.

Although Judge Brieant found that Ostrer had failed to establish that the $80,000 was "intentionally released to Hellerman so he could pay loansharks," he also concluded that the Government's decision had in effect made it possible for Hellerman to gain a benefit and that it should have advised counsel of these facts prior to trial.

The second undisclosed incident was the Government's decision not to oppose Hellerman's motion for enlargement

of his bail limits. During the summer of 1972, nearly two years after Hellerman had begun cooperating with the Government, he had been named as a defendant in several different indictments and was expected to testify at Ostrer's trial. This testimony would destroy Hellerman's effectiveness as a confidential informant, and it was anticipated that he would have to be relocated and given a new identity when the trial was completed.

In August, 1972, several months prior to Ostrer's trial, Hellerman's counsel filed a motion to enlarge Hellerman's bail limits so that he could travel to Europe for a few weeks. The purpose of the trip was partly recreational, and partly to give Hellerman and his family an opportunity to consider possible relocation sites. After obtaining assurances from defense counsel (now Judge) Vincent Broderick and Thomas Edwards to the effect that Hellerman would neither flee nor secrete money in European banks while on this trip, the Government decided to take no position with respect to this motion. The motion was granted by Judge Lasker. Hellerman travelled to Europe and returned.

The district court held that the Government's non-opposition to the Hellerman bail motion "was certainly a reward for his co-operation." Judge Brieant concluded that the facts concerning the motion should have been disclosed to defense counsel.

Although Judge Brieant concluded that the information regarding the two incidents should have been turned over to the defense, he denied Ostrer's petition on the ground that the evidence was not material, in view of the extensive impeachment data with respect to Hellerman that had been fully exploited on cross-examination. The additional evidence, Judge Brieant concluded, did not "raise a reasonable doubt." Similarly, the district court rejected Ostrer's contention that the Government's failure to make

available evidence with respect to various other matters (described below) violated *Brady*. From this decision Ostrer appeals.

Discussion

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the Government's failure to make available exculpatory evidence specifically requested by the defendant (in that case, a co-defendant's statement corroborating the accused's version of a homicide) constituted a denial of due process. The principle has since been extended to apply to material evidence that would impeach a Government witness whose "reliability . . . may well be determinative of guilt or innocence." *Giglio* v. *United States*, 405 U.S. 150, 154 (1977) (knowing use by Government of perjured testimony regarding promises by the prosecutor to the witness), quoting *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

These decisions left open the question of what standards were to be applied in determining whether evidence would be deemed "material" for *Brady* purposes. In most cases the issue can be resolved without difficulty. Certain proof is so clearly exculpatory or valuable for impeachment purposes that any reasonable prosecutor will immediately recognize its utility to the defense. But the possible value of other proof, even with the aid of hindsight (which is not available when the prosecutor must decide whether to disclose) may be speculative, extremely doubtful, or not apparent. Since materiality is a rather broad concept, apt to be elusive at times, it might be interpreted by some as requiring the Government to turn over to the accused virtually everything in its files that could by any stretch of the imagination be useful to the defense, whether or not foreseeable.

It was therefore essential to establish some standards or guidelines for compliance with *Brady's* requirements. This the Supreme Court undertook to do in *United States* v. *Agurs*, 427 U.S. 97 (1976). There the Court described the types of cases in which the *Brady* rule applies: (1) where the undisclosed evidence shows that the Government's case includes perjured testimony and that the prosecutor knew, or should have known, of the perjury, (2) where the defendant made a specific request for particular undisclosed information, and (3) where the defendant made no request, or made only a general request. The Court held that when the Government's nondisclosure falls within either of the first two categories a strict standard of materiality should apply, with the defendant being entitled to a new trial if there is any reasonable likelihood that the evidence could have affected the outcome of the trial. *Agurs, supra*, 427 U.S. at 103-04. On the other hand, if the defendant makes no request or only a general request for evidence that is then not disclosed (e.g., "all *Brady* material," "all exculpatory material"), he is entitled to a new trial only if the undisclosed evidence, viewed in the context of the entire record, creates a reasonable doubt that otherwise would not exist. *Id.* at 112-13.

Ostrer has argued, both below and here, that this case falls within either the first or second of these categories described in *Agurs*. Clearly it does not meet the requirements of the first, since Judge Bricant could "not find on the evidence submitted here that Hellerman committed any specific perjury at trial. It follows that the Government did not knowingly rely on perjured testimony at Ostrer's trial." Nothing in the record on appeal leads us to disturb this finding.

Nor does this case come within the second *Agurs* category, since there was no specific request for the particular

undisclosed information. Indeed, Ostrer himself made no request at all. His co-defendant Dioguardi, however, did make a pretrial non-specific *Brady* request, and Ostrer now contends that he should be deemed to have joined in his co-defendant's request.[2] Even if Ostrer is deemed to have joined in the Dioguardi request, the latter was not sufficiently specific to come within the second *Agurs* category. Approximately one month prior to the trial, Dioguardi's counsel asked for

> "4) any other material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and 5) any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government."

This request amounted to nothing more than a boilerplate demand for "all *Brady* material" or for "anything exculpatory," which the Supreme Court described in *Agurs* as a request that gives "the prosecutor no better notice than if no request is made." 427 U.S. at 106-07. A specific request, said the court in *Agurs*, is one similar to the request made in *Brady* itself—a request for "specific information" that gives the prosecutor "notice of exactly what

---

2 The district court's opinion states that "Ostrer's trial counsel specifically requested that the Government make available any material bearing adversely on the credibility, character or reputation of Hellerman." Prior to oral argument we were unable to discover in the record any support for this finding. Nor was Ostrer's counsel at oral argument able to point to Ostrer's request for *Brady* material in the record. Following argument, we received a letter from Ostrer's counsel directing our attention to certain documents in the record. After reviewing these materials, we are still convinced that Ostrer never made a *Brady* request, and that the district court's finding refers to the Dioguardi request.

the defense desire[s]."[3] 427 U.S. at 106. See *United States* v. *Lasky*, 548 F.2d 835, 839 (9th Cir. 1977).

Since only a general request was made in this case, appellant's burden under *Agurs* is to show that the undisclosed evidence, when "evaluated in the context of the entire record," 427 U.S. at 112, creates a reasonable doubt about his guilt. This he has failed to do.

Ostrer's defense at trial consisted primarily of an attack on Hellerman's credibility; thus the only conceivable way in which the undisclosed evidence could create a reasonable doubt about Ostrer's guilt would be if the knowledge of those two impeaching incidents, in addition to the numerous others used on cross-examination, would persuade a fact-finder to disbelieve Hellerman's testimony against Ostrer. We are satisfied that the additional evidence would not have had such an effect.

The undisclosed evidence fell far short of a Government benefit in exchange for the witness' cooperation. It remains undisputed that Morvillo refused to turn over the $80,000 to Hellerman and that, upon deciding to turn it over to Natco, had warned him and Schustek that they would be prosecuted if they diverted the money to non-corporate purposes. At most the Government's role, in view of Schustek's disregard of this warning, became ambiguous. The suggestion that the Government's non-opposition to the court-approved enlargement of bail would have been useful impeachment evidence borders on the frivolous. However, even accepting Ostrer's contention that these two incidents could have been used effectively to attack Hellerman's credibility as a witness, they represented a mere drop in the bucket when viewed in the context of the wealth

3 In *Brady* v. *Maryland*, 373 U.S. 83 (1963), defense counsel made the specific request prior to trial to examine the out-of-court statements made by Brady's co-defendant.

of other impeaching material used upon cross-examination of Hellerman.

"During the trial the jury heard Hellerman repeatedly acknowledge his participation in numerous criminal activities. Hellerman testified that during the preceeding [sic] five years he was involved in approximately eight to twelve criminal acts for which he was not prosecuted, and three cases in which he pleaded guilty. (Belmont tr. 390-91, 602). Hellerman acknowledged his role in frauds involving the securities of Belmont Franchising Corporation, Globus, Automated Information, Minute Approval Credit, and At Your Service Leasing. (Belmont tr. 690-91; 716-17). He admitted that he was involved in having someone pay bribes to New York City policemen, and he testified to his well founded belief that the United States Attorney's Office would convince the local authorities not to prosecute him. (Belmont tr. 806-07). Hellerman acknowledged that he purchased stocks, dresses, and jewelry which he knew to have been stolen (Belmont tr. 808), and that he paid money to others for the purpose of bribing state court judges, a state liquor authority investigator, and a union delegate. (Belmont tr. 811). In addition, Hellerman testified that he had been involved in criminal activity in connection with Natco and Merchandise Plus (Belmont tr. 741), that he had been barred by the SEC from activities in the securities industry since 1961 (Belmont tr. 606), that he told Jack Kelsey to file false papers with the SEC hiding Hellerman's interest in a brokerage firm (Belmont tr. 612), and that he participated in a scheme to submit a fraudulent check to a Bahamian bank. (Belmont tr. 619). He also acknowledged disobeying court orders. (Belmont tr. at 731).

"The jury also heard Hellerman testify that after he had begun to cooperate with the Government and had agreed not to engage in any additional criminal activity, he broke that promise, and continued his illegal conduct. (Belmont tr. 822-23; 938-39; 948). Hellerman testified that after he broke his promise he engaged in swindles which earned him over $250,000.00 and for which he was not prosecuted.

"Finally, the summations for both Ostrer and Dioguardi were replete with references to Hellerman's corrupt and criminal activity and the 'extraordinary' agreement he entered into with the Government immunizing him from prosecution for most of his crimes.

"Trial counsel emphasized clearly to the jury that the Government had 'bought' the testimony of a man who, having promised the United States Attorney's Office once before that he would not commit any more crimes, then went out and continued his corrupt and sordid activities. (Belmont tr. 1721-24; 1731-32; 1754; 1783; 1793-94)." *Findings and Conclusions of Judge Brieant*, 8/12/77, pp. 39-40.

In light of this evidence, as well as the direct incriminating evidence against Ostrer (the sufficiency of which was not even challenged on direct appeal, 492 F.2d 70), we agree with the district court that the Nateo episode and the Hellerman bail motion were not material.[4] Disclosure of this information would not have created a reasonable doubt in the minds of the jurors who found Ostrer guilty; nor

4 Technically, the district court erred in holding that it was a violation of *Brady* not to disclose the Government's role in the Nateo episode and the enlargement of Hellerman's bail limits but that since this evidence was not material relief should be denied. *Brady* requires only the disclosure of material information, not all evidence that might conceivably be of use to the defense. Since the undisclosed evidence here was not material there was no failure to comply with *Brady*.

does the disclosure now raise a reasonable doubt about Ostrer's guilt.[5] Consequently a new trial is not warranted. Accord, *United States* v. *Stassi*, 544 F.2d 579, 584 (2d Cir. 1976); *United States* v. *Erb*, 543 F.2d 438, 443 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976); *Brach* v. *United States*, 542 F.2d 438 (2d Cir. 1976); *United States* v. *Corr*, 434 F. Supp. 408, 414 (S.D.N.Y. 1977)

Ostrer also contends that the Government violated its *Brady* obligation by not disclosing evidence concerning (1) a motion by Hellerman to reduce his sentence, (2) the selection of the location where Hellerman served his sentence, (3) a reduction in Hellerman's legal fees, and (4) the non-prosecution of Hellerman's family. The district court rejected these contentions, and after a careful review of the record, we affirm this aspect of the decision below, as well as the district court's finding that the Government complied with its obligations under 18 U.S.C. §3500. None of these claims merits discussion.

We also affirm the district court's decision to deny the claim for a new trial based on purportedly new information concerning the mental state of a trial juror. On similar facts, the denial without hearing of a virtually identical motion was affirmed by this court in *United States* v. *Dioguardi*, 492 F.2d 70, 78-81 (2d Cir. 1974). We fully agree with the district court's characterization of this aspect of Ostrer's petition as "cumulative, repetitious, and untimely." The new information concerning the juror's mental state proffered by Ostrer in the affidavit of Junius Rush

5 The *Agurs* opinion suggests that the district court's task in a case such as this is to determine for itself whether the undisclosed evidence creates a reasonable doubt concerning the defendant's guilt, rather than whether the evidence would have created a reasonable doubt in the minds of the trial jurors. See 427 U.S. 112-14; see also 427 U.S. 115-16 (Marshall, J., dissenting). Under either approach, we are satisfied that the denial of the petition should be affirmed.

was substantially undermined by the affidavit later obtained from Mr. Rush and filed by the Government in which the affiant modified, if not repudiated, much of his first sworn statement.

The order of the district court is affirmed with the direction that the mandate issue forthwith.

MOORE, *Circuit Judge* (Concurring):

I concur in affirming the order denying appellant's petition to vacate his conviction but differ in my reasons in one, to me, important respect. I do not agree that the Government's role with respect to the $80,000 was "ambiguous" or that this incident and the enlargement of bail incident represented "a mere drop in the bucket". However, whether they would have caused the bucket to overflow is quite another matter.

I believe that Judge Bricant's finding, as follows, is clearly supported by the record:

> "(1) the Government prevented Sammy Feet [Hellerman's co-conspirator in the Natco fraud] from stealing the $80,000 in Natco funds by freezing the proceeds of the check which Schustek and Feet had caused to be deposited in the Bahamas casino . . .: (2) Hellerman and Schustek did reveal the full story of the Natco swindle, including their own participation, to the Government, thereby making the Government fully aware of the intended goal of Natco's bankruptcy, before it released the $80,000 to Kurland [the lawyer who presented a handwritten retainer signed by Schustek to the Government in order to obtain the funds "on behalf of Natco"]; (3) the Government was aware before it reached its decision to release the funds to an attorney authorized by Schustek, that

> Hellerman desperately needed this money to pay off loansharks who were threatening his life. . . .
>
> "In the face of all of this, the Government released the funds [the $80,000] to . . . Kurland . . . without investigating either Kurland or his intentions, or those of Schustek with respect to the $80,000.00. In addition, the Government made no effort to ascertain whether Natco was actually then bankrupt (which it was as of January 26, 1971 . . .) or whether the intended fraud was sufficiently advanced so that the seized money could be held in the Government's possession as evidence, or to prevent its theft by Hellerman.
>
> "Hellerman expressed his own belief, at the evidentiary hearing and in [*Wall Street Swindler*], that the Government intentionally allowed him to retrieve the $80,000.00 thus conferring a substantial benefit on him. . . .
>
> ". . . The Court finds, as it must based on the record before it, that it should have been readily apparent to the Government, when it did release these funds, that the money inevitably would end up in Hellerman's pocket. In effect, the Government chose to look the other way. While denying Hellerman's direct request for the money, the Government accorded him the opportunity to gain possession of it indirectly by the charade of having the corporation's 'attorney' demand and receive it for deposit in a corporate bank account. By conscious avoidance the Government thus intentionally eased the way for Hellerman to benefit from its decision to release the $80,000.00 in stolen funds. . . ." (District Court's Findings, Appendix at 318-19) (footnote omitted).

I also believe that the *Brady* request was "specific",[1] that these disclosures were embraced within the *Brady* doctrine, were material, and should have been disclosed. Had there been no other evidence reflecting on Hellerman's credibility, these governmental favors would, in my opinion, have been admissible and material to that important issue.

However, Hellerman's credibility had been subjected to a devastating barrage, set forth in detail by Judge Briant and incorporated in Judge Mansfield's opinion. Since we are faced, in reality, with the speculation of what the jury —or even one juror—would have done had this information been presented, we cannot, under the law, speculate,

1 That the request was made by Ostrer's co-defendant and not Ostrer himself, is, in my view, immaterial, given the function of the request—i.e., to ease the prosecutor's task of determining the "materiality" of exculpatory evidence in the context of the case, *Agurs*, 427 U.S. at 106-07—and given the fact that copies of the motion papers were sent to Ostrer's counsel as well as to the court and the prosecutor. The motion, moreover, had requested a pretrial conference for the purpose of obtaining a *Brady* order. Ostrer's counsel and the court might well have believed that the co-defendant's request in this multi-defendant proceeding would be sufficient to protect the *Brady* rights which were shared by Ostrer and co-defendant Diogiardi, both of whose convictions would be dependent, in large part, on the jury's assessment of Hellerman's credibility.

Sound policy would seem to require that no hypertechnical lines be drawn in this area. To require identical requests in multi-defendant trials would inundate the courts and the prosecutor's office with requests which would serve no useful purpose. Once the prosecutor is on notice that certain materials are deemed sufficiently "material" to one co-defendant to require their production, his legal duty to provide those materials has crystallized, regardless of who the movant may have been. "Pretrial discovery," we have said in the past, "should be approached with a spirit of cooperation among court and counsel in order to prevent . . . burdensome recesses and also, we should emphasize, to protect the government against . . . claims of suppression of material and favorable evidence. . . ." *United States* v. *Perez-Perez*, 490 F.2d 126, 132 (2d Cir. 1974). I would not limit a prosecutor's constitutional duty to disclose when his duty is brought home to him by any one defendant's request.

but must substitute well-reasoned judgment therefor. Searching retroactively into the composite mind of the jury, I, too, come to the conclusion that the addition of these withheld facts would not have created a reasonable doubt, in view of all the evidence before them, of Ostrer's guilt—hence, I would affirm.

Appendix C.

September 26, 1978

Mr. Harvey A. Silverglate
Silverglate, Shapiro and Gertner
217 Lewis Wharf
Boston, Massachusetts 02110

Dear Mr. Silverglate:

This is in response to your letter of August 29, 1978. A preliminary inquiry into the *Ostrer* matter has disclosed that none of the Assistant United States Attorneys involved in the original trial are still on duty and that the two Assistants now handling the proceedings had nothing to do with the *Ostrer* trial. Accordingly, we plan to take no further action regarding this matter.

Sincerely,
MICHAEL E. SHAHEEN, JR.,
Counsel

No. 78-586

In the Supreme Court of the United States

OCTOBER TERM, 1978

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
WADE LIVINGSTON
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-586

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 47a-63a) is reported at 577 F.2d 782. The opinion of the district court (Pet. App. 1a-46a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1978. A petition for rehearing was denied on July 10, 1978. The petition for a writ of

certiorari was filed on October 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to have his conviction vacated on collateral attack because the government, in disclosing evidence during pretrial discovery, did not include certain information that petitioner might have been able to use to supplement his impeachment of a key government witness.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of violating various provisions of the securities laws and the mail and wire fraud statutes and of conspiracy to commit those crimes. He was sentenced to three years' imprisonment and a fine of $55,000. The court of appeals affirmed. *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974).[1] In April 1977, petitioner moved to vacate his conviction pursuant to 28 U.S.C. 2255, contending that the government had violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). After an extensive hearing, the district court denied the petition (Pet. App. 1a-46a)

[1] On December 11, 1974, petitioner moved for a new trial on the ground of newly discovered evidence. The district court denied the motion (422 F. Supp. 93 (S.D. N.Y. 1976)) and the court of appeals affirmed, 551 F.2d 303, cert. denied, 430 U.S. 946 (1977).

and the court of appeals affirmed (Pet. App. 47a-63a).

1. The evidence at petitioner's trial is detailed in the opinion of the court of appeals on direct appeal. 492 F.2d at 73-75. Briefly, it showed that petitioner and several others, including Michael Hellerman and co-defendant John Dioguardi, had conspired to raise artificially the price of nearly worthless stock of the Belmont Franchising Corporation from a few dollars to nearly $50 a share and to sell the security to the public.

Hellerman was a principal government witness at trial. Petitioner's defense consisted in large part of an attempt to impeach Hellerman by portraying him as a corrupt and venal criminal who had received substantial benefits because of his cooperation with the government. This impeachment, the district court noted (Pet. App. 43a-44a), included the following: Hellerman repeatedly admitted his participation in numerous criminal activities, including swindles that had earned him over $250,000, even after he had begun to cooperate with the government and had agreed not to engage in further criminal conduct. He admitted that during the preceding five years he had been involved in approximately eight to twelve criminal acts, including some in connection with Natco, Inc., and Merchandise Plus, Inc., for which he had not been prosecuted, and that in three other cases he had pleaded guilty. He acknowledged his role in frauds involving the securities of Belmont Franchising Corporation and four other companies. He admitted that

he was involved in having someone pay bribes to New York City policemen, and he testified to his well founded belief that the United States Attorney's office would convince the local authorities not to prosecute him. He acknowledged that he had purchased stocks, dresses, and jewelry that he knew to have been stolen, that he had paid money to others for the purpose of bribing state court judges, a state liquor authority investigator, and a union delegate, that he had been barred by the Securities and Exchange Commission from activities in the securities industry since 1961, that he had told someone to file false papers with the SEC hiding his interest in a brokerage firm, that he had participated in a scheme to submit a fraudulent check to a Bahamian bank, and that he had disobeyed court orders.

2. Petitioner's motion to vacate his conviction concerned the government's failure to disclose certain activities that had resulted in the release to Hellerman of $80,000 belonging to Natco, Inc., and Merchandise Plus, Inc., and the government's decision not to oppose Hellerman's motion for enlargement of his bail limits to enable him to travel to Switzerland.[2]

[2] In addition, petitioner contended that the government had violated its *Brady* obligation by not disclosing evidence concerning a reduction in Hellerman's legal fees and that Hellerman had testified falsely at trial concerning his intent to make restitution to victims of the fraud. Petitioner did not make a *Brady* motion prior to trial. However, petitioner's co-defendant made a pretrial request for

> any * * * material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and * * * any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government.

(Pet. App. 39a, 55a.)

The facts developed at the evidentiary hearing on these contentions are set forth in the opinions below (Pet. App. 49a-52a, 6a-19a) and may be summarized as follows:

As to the Natco incident, the evidence showed that early in 1971 Hellerman was involved in a bankruptcy fraud whereby the assets of the Natco and Merchandise Plus Corporations would be sold at a discount and the proceeds would be taken from the corporations (A. 1339-1343).[3] As the fraud evolved and the conspirators drained the companies' assets, eventually $80,000 of corporate funds remained (A. 1357-1358, 1582-1583). Before this money could be diverted, Hellerman informed the FBI of the scheme, and the government obtained control of the $80,000 (A. 1363-1369, 1389, 1582-1583).

Several Assistant United States Attorneys, including Assistant United States Attorney Robert Mor-

[3] "A." refers to petitioner's appendix in the court of appeals. Hellerman and several other persons were indicted for their involvement in the scheme. Counsel for co-defendant Dioguardi knew of the Natco indictment from a pretrial interview of Hellerman and questioned Hellerman about Natco in the presence of the jury (Pet. App. 15a).

villo,[4] were concerned that the government had no legal right to keep the money and that the government might be accused of precipitating the corporations' bankruptcy by holding on to it (A. 1588-1589). At about the same time, Hellerman asked Assistant United States Attorney Morvillo to release the $80,000 to him because he needed the money to pay off loan sharks (A. 1353, 1367-1368, 1574, 1583-1584). Morvillo emphatically refused and told Hellerman that the money would only be released to an attorney representing the corporations and that if the money were used for other than corporate purposes Hellerman would be prosecuted (A. 1367, 1381-1382, 1490-1491, 1585, 1594, 1641-1642). The government then released the money to an attorney, Edward Kurland, who had produced a letter stating that he represented Natco, that he was demanding the return of the $80,000 on behalf of the company, and that he would be responsible for the disposition of the funds (A. 1643, 1652-1657; A.X. 14).[5] Although Morvillo gave the money to Kurland with the direction that it be placed in a corporate account, Hellerman eventually obtained most of the money and used it to pay off the loan sharks who were pressing him for payment (A. 1643, 1652-1657, 1384, 1408, 1787-1791).

---

[4] At all relevant times, Morvillo was either chief of the fraud unit or chief of the Criminal Division of the United States Attorney's office for the Southern District of New York.

[5] "A.X." refers to the exhibits to the appendix filed by petitioner in the court of appeals.

The bail incident related to the summer of 1972, after Hellerman had been named as a defendant in several indictments. Hellerman asked the district court to extend his bail limits so that he could travel to Switzerland for the purpose of finding a place where he could live safely after testifying for the government (A. 1437, 1632). After Hellerman's attorney had assured Assistant United States Attorney Morvillo that Hellerman would not use the trip as an opportunity to hide funds abroad or to flee, the government decided neither to oppose nor to consent to Hellerman's motion, and the motion was granted (A. 1630-1632).

In an extensive opinion, the district court held that the government's failure to inform petitioner prior to trial of its role in the Natco incident or its position on the bail modification motion did not warrant relief under Section 2255, concluding (Pet. App. 44a-45a):

> In view of the extensive data provided to the jury, we find that the Natco information is not material, in the sense that it probably would not have affected the outcome of the trial. In words quoted from *Agurs*, p. 102 [*United States* v. *Agurs*, 427 U.S. 97 (1976)], it "shed no light on Sewell's [read Hellerman's] character that was not already apparent from the uncontradicted evidence." Nor does the suppressed evidence raise a reasonable doubt. One more promise or benefit to Hellerman is no evidence of Ostrer's innocence. Therefore, the Court concludes that the suppression of the Natco $80,000.00 matter does not require us to grant Ostrer a new trial.

> This Swiss trip does not warrant a new trial since, for the same reasons set forth above, there is no probability that this information would have raised a reasonable doubt. The jury was well [acquainted] with the Government's lenient treatment of Hellerman, and one more instance of Government largesse would not have been of any significance.

The court of appeals affirmed in a thorough opinion on which we substantially rely (Pet. App. 47a-63a).

ARGUMENT

Both lower courts found that, in the circumstances of this case, the government's failure to disclose the details of the Natco incident or bail modification motion did not violate its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and did not deprive petitioner of a fair trial. This essentially factual conclusion is correct and does not warrant further review.

The heart of petitioner's claim is that the district court found corrupt practices on the part of the government in its release of the $80,000 in Natco funds to Kurland. Specifically, petitioner asserts that Assistant United States Attorney Morvillo, acting through a ruse, "participated in and aided a successful effort by Hellerman to obtain for his personal use $80,000 that belonged to the estate of a bankrupt corporation," that "a theretofore well-regarded former high official in the United States Attorney's Office had engaged in corrupt and undisclosed practices

in dealing with the key prosecution witness," that the testimony of the witness was "tainted by corrupt and secret practices on the part of a high prosecutorial official," that there was "a carefully orchestrated effort by a certain person or persons in the Government to coverup the violations around which this case revolves," and that the Court must review this case "in order to discourage and remedy corrupt practices" (Pet. 6-8). The short answer to these allegations is that neither the district court (which, in petitioner's words, made "careful and well-supported findings" (Pet. 9)) nor either opinion of the court of appeals adopted this view of the record.

To the contrary, the district court, while concluding that the government should have communicated its information about the $80,000 to petitioner (Pet. App. 14a), specifically found that petitioner "has been unable to confirm the contention that these funds were intentionally released to Hellerman so he could pay the loansharks" (*id.* at 11a) and that "the $80,000.00 can be considered as merely one facet of the Government's broader program to guarantee Hellerman's safety rather than an effort to put cash in his pocket" (*id.* at 43a). Similarly, the majority opinion of the court of appeals stated: "The undisclosed evidence fell far short of a Government benefit in exchange for the witness' cooperation. It remains undisputed that Morvillo refused to turn over the $80,000 to Hellerman and that, upon deciding to turn it over to Natco, had warned him and Schustek [Hellerman's associate] that they would be prosecuted if they diverted the money to noncorporate purposes. At

most the Government's role, in view of Schustek's disregard of this warning, became ambiguous" (*id.* at 56a). And the concurring opinion in the court below essentially adopted the findings of the district court (*id.* at 60a-61a). Hence, none of these opinions contains any suggestion of corrupt practices.[6]

Nor is this a case where the court of appeals "substantially ignored, distorted, or altered the careful and well-supported findings of the District Judge" (Pet. 9). Rather, both lower courts reviewed petitioner's claims under the standards of *United States* v. *Agurs*, 427 U.S. 97 (1976), differing only in a few minor respects. Both courts relied heavily on the same evidence at trial that impeached Hellerman's credibility, with the court of appeals quoting from and relying extensively upon the opinion of the district court (Pet. App. 57a-58a).[7] Significantly, neither court found that Hellerman had committed perjury at petitioner's trial (*id.* at 32a, 35a, 54a).

While it is true that the district court, unlike the court of appeals, found that the pretrial *Brady* request in this case—a request made by petitioner's

[6] In any event, as the Court remarked in *United States* v. *Agurs*, 427 U.S. 97, 110 (1976), "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

[7] Although the court of appeals, unlike the district court, characterized the government's role with respect to the $80,000 as "ambiguous" and the incidents involved as a "mere drop in the bucket" (Pet. App. 56a), these characterizations related to a difference of opinion over ultimate rather than evidentiary facts and are a far cry from a distortion or alteration of the record.

co-defendant, rather than petitioner—was "specific" (Pet. App. 54a-55a, 39a),[8] it, like Judge Moore, who reached the same conclusion, still found that the undisclosed evidence about the Natco incident was not material under *Agurs* (*id.* at 44a, 58a). As the district court noted, "it probably would not have affected the outcome of the trial. * * * [I]t 'shed no light on * * * [* * * Hellerman's] character that was not already apparent from the uncontradicted evidence' " (*id.* at 44a, quoting *United States* v. *Agurs*, *supra*, 427 U.S. at 102). The court therefore found that "no reasonable person could say that the suppressed evidence *probably would* have altered the outcome of the trial" (*id.* at 42a; emphasis in original). Similarly, the court of appeals concluded that "[d]isclosure of this information would not have created a reasonable doubt in the minds of the jurors who found [petitioner] guilty" (*id.* at 58a).[9] Petitioner has

[8] Petitioner contends (Pet. 30) that, in light of what defense counsel knew, he could not have made a more specific request for *Brady* material. However, counsel learned at least by the time of trial that Hellerman had been involved in the Natco swindle (Pet. App. 13a), and he could have framed a request at that time calling for material in connection with this incident. See note 3, *supra*.

[9] Our response is centered on the Natco incident, petitioner's principal complaint. The district court adequately answered petitioner's other contentions, concerning the bail modification motion (Pet. App. 16a-19a), the reduction in Hellerman's legal fee (*id.* at 21a-23a), and Hellerman's restitution promise (*id.* at 29a-34a). The court of appeals summarily rejected these contentions (*id.* at 59a), noting that "the suggestion that the Government's non-opposition to the court-approved enlargement of bail would have been useful impeachment evidence borders on the frivolous" (*id.* at 56a).

offered no reason to interfere with these consistent determinations.[10]

Finally, this case does not have "ominous implications for the integrity of the criminal justice system in the second circuit" (Pet. 29-34). Petitioner's citation (Pet. 27-28) of numerous cases from that circuit in which the court of appeals carefully scrutinized the government's compliance with its *Brady* obligation certainly belies that assertion. There is no reason to suppose that federal prosecutors obligated to see that justice is done (see *Berger* v. *United States*, 295 U.S. 78, 84 (1935)) will jeopardize convictions by withholding information that a reviewing court at a post-conviction hearing might find could have created a reasonable doubt at trial. If the case is one that depends upon the credibility of a witness, and if the withheld evidence is highly probative or the remaining evidence available to impeach the witness is slight, there is always the possibility that the court might find that the undisclosed evidence might have tipped the balance. Here, however, both lower courts carefully reviewed the evidence before the jury reflecting on Hellerman's veracity

[10] Indeed, other courts of appeals have applied heavier burdens on a defendant than did the Second Circuit in cases where the undisclosed evidence would have been relevant only for purposes of impeachment. See *Galtieri* v. *Wainwright*, 582 F.2d 348, 363 & n.28 (5th Cir. 1978) (en banc); *Garrison* v. *Maggio*, 540 F.2d 1271 (5th Cir. 1976), cert. denied, 431 U.S. 940 (1977). See also *United States* v. *Lasky*, 548 F.2d 835, 839-840 n.3 (9th Cir.), cert. denied, 434 U.S. 821 (1977).

(see pages 3-4, *supra*) and correctly concluded that the additional impeachment evidence withheld from petitioner would not have changed the outcome of petitioner's trial.[11]

[11] The facts of this case differ considerably from *United States* v. *Librach*, 520 F.2d 550 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976), where the prosecutor suppressed evidence that a government witness had received a direct payment of almost $10,000 for his testimony, since that evidence shed far greater light on the witness's motive to testify in the government's favor and the witness's friendly relationship with the government had only partially been disclosed at trial. The error in *United States* v. *Garza*, 574 F.2d 298 (5th Cir. 1978), was the trial judge's failure to submit certain defense exhibits to the jury, not the suppression of evidence by the prosecution.

This case is more like *United States* v. *Minichiello*, 510 F.2d 576 (5th Cir. 1975), where defendant learned after trial that a government witness had been reimbursed for some expenses. The court denied post-convention relief, holding that "the jury had adequate information that [the witness] was trying to save his own skin. The question whether he was paid, and for what, is not so material as to require a new trial" (*id.* at 578).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
WADE LIVINGSTON
Attorneys

DECEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 282796 240

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-586.

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Response to Brief of the United States in Opposition.

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
Counsel for Petitioner.

Of Counsel:
HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO & GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-586.

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Response to Brief of the United States in Opposition.

The Government notes in its brief (at page 5, n.3) that trial counsel for Ostrer's co-defendant "knew of the Natco indictment . . .." That is true. However, it gives the misleading impression that one or more defense counsel therefore knew or should have known that in connection with the Natco bankruptcy fraud indictment, in which Hellerman was named as a

co-conspirator and indictee, Hellerman had received $80,000 of the bankrupt corporation's estate with the aid of the FBI and the United States Attorney's office. This $80,000 "gift" to Hellerman was never mentioned nor brought up in either the Natco case or at Ostrer's trial (in which Hellerman was the Government's sole incriminating witness against Ostrer). Ostrer's trial counsel could hardly be expected to guess, without any hints or clues, that a Government official would have engaged in this kind of activity. (Given the nature of the activity — the transmittal of $80,000 in stolen funds to a Government witness prior to his court testimony — it is readily apparent why there was no disclosure to defense counsel at trial!)

The Government states (at 9) that neither the District Court nor the Court of Appeals shared Petitioner's view of the record. This simply is not true. The District Court made quite specific findings of fact that were so shocking that the court declined to mention by name the Chief of the Criminal Division responsible for what happened; instead, the court referred to him simply as "the Chief." Apparently as an additional accommodation to this ex-Government official, the District Judge has thus far refrained from publishing his extensive opinion. Also, the dissent in the Court of Appeals shared the District Judge's view of the case, noting that the District Court's findings were well supported by the evidence and were entitled not to be disturbed on appeal. Petitioner urges this Court to call for the transcript of the evidentiary hearing if there is any doubt that the findings were not only supportable, but in fact virtually self-evident. The District Judge quite clearly arrived at his conclusions reluctantly, sadly, but with a firm eye on his duty. For the Government to claim (at 10) that "none of these opinions contains any suggestion of corrupt practices" is the height of inappropriate denial in the face of the overwhelming reality.

The Government seems to take comfort from the fact that "neither court found that Hellerman had committed perjury at petitioner's trial." Yet the crux of Petitioner's claim is precisely that he was unable to inquire of Hellerman as to his involvement with the Government in looting the bankrupt corporation, because these incidents were carefully and successfully hidden, until publication of Hellerman's autobiography (*Wall Street Swindler*) brought the matter into the open long after Ostrer's trial.

Contrary to the impression conveyed by the Government (at 10, n.6), Petitioner is not attempting to try the prosecutor's character, except insofar as his *Mesarosh*[1] argument is concerned. (There must come a point, after all, when enough is declared to be enough!) Petitioner's essential argument is that had the jury known of Hellerman's being assisted in criminal enterprises by the very prosecutor's office that was "sponsoring" him and vouching for his veracity, the jury almost certainly would not have believed Hellerman's uncorroborated testimony against Ostrer.

The Government (at 12) misunderstands the institutional problems posed by the way the disclosures in this case have been treated by the Department of Justice and by the Court of Appeals. The Government seems to feel that "there is no reason" to think that prosecutors will jeopardize convictions by witholding *Brady*[2] material. Of course, this is always the case with reversible error — there is seldom reason to believe that a prosecutor acting in good faith will intentionally suppress. However, what happened here was that the Chief of the Criminal Division acted *sub rosa* in funnelling stolen funds

---

[1] *Mesarosh* v. *United States*, 352 U.S. 1 (1956).

[2] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

for the use and benefit of a witness, because he apparently felt (as the District Court found) that getting this money to Hellerman was important in keeping his witness alive, satisfied, and "on the street." (See Petition at 43a). Once this was accomplished, one could expect the prosecutor not to disclose the $80,000 payment and his own role in it, to insure against the possibility that the caper would later be discovered and would be deemed reversible error by a reviewing court. In fact, given the Court of Appeals' application of the *Agurs*[3] doctrine to the facts of this case, prosecutors do not really have to even worry about reversible error when they act as the Chief acted here. Therefore, unless this Court takes an unequivocal stand on this kind of conduct, one can expect it to be repeated.

Finally, of course, it is an insult to the jury system to declare, as did the court below, that knowledge of the duet between the Chief and Hellerman in looting a bankrupt corporation for the benefit of the witness would not likely have changed the jury's view of Hellerman's veracity where his testimony was entirely uncorroborated, and where it was the Chief and the Government who vouched for his credibility.

Respectfully submitted,

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
(617) 495-4617
Counsel for Petitioner.

Of Counsel
HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO
& GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.

---

[3] *United States* v. *Agurs*, 427 U.S. 97 (1976).